QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

July 1, 1943

Through September 30, 1943

Volume XXXII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from July 1, 1943, through September 30, 1943.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

WILLIAM N. McQUEEN,

Acting Attorney General.

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OPINIONS

July 2, 1943.

Hon. H. G. Dowling,

Commissioner of Revenue,

State Department of Revenue,

Montgomery, Alabama.

Sales Tax—Use Tax—

Sales tax and use tax liability of contractors in the performance of contracts with the United States.

Opinion by Assistant Attorney General Lapsley.

Dear Sir:

Your request for an official opinion under date of June 28, 1943, is as follows:

"Where the contractor has entered into a contract with the United States for the construction of various buildings, structures, and improvements upon lands, and the furnishing and installation thereon of machinery and equipment; and also requiring the contractor to purchase and deliver to the United States various items of personal property not to be installed or attached to the realty, such as office fixtures and equipment, radios, etc., on a cost-plus basis, certain questions have arisen in enforcing the Alabama Sales Tax and Use Tax Acts with respect to which your official opinion is requested as follows:

"1. Is such contractor liable for the sales tax or use tax upon all tangible personal property purchased, acquired, or otherwise furnished by him in the performance or fulfillment of such contract?

"2. Where any portion of the construction work is let by the prime contractor to a subcontractor, does the same rule of liability apply to the subcontractor in the purchase, acquisition, or otherwise furnishing of tangible personal property in the performance or fulfillment of the contract made with such subcontractor?

"3. What is the rule which should be followed with respect to equipment and machinery acquired and installed by such contractor or subcontractor?

"4. What is the rule which should be followed with respect to the tax liability as to tangible personal property furnished pursuant to a contract, where the property upon delivery to the United States by the contractor is not affixed or attached to the land or any structure but remains in the form of tangible personal property?

"5. What is the rule which should be followed when a subcontract

is made with a manufacturer of the material or property to be furnished and to go into the structure or building or to be attached or affixed thereto?"

1. Your first inquiry is whether or not the building or construction contractor becomes liable for the payment of sales or use tax upon tangible personal property used by him in the performance of a construction contract.

The theory of the Sales Tax and Use Tax Acts is to impose the tax upon the retail sale of tangible personal property, that is, the final sale to the ultimate consumer. In the case of a construction contractor, it is obvious that the materials used by him in the building of any structure upon the land of the owner, upon being placed in the building or structure, cease to be personal property. Unless the tax applies, therefore, upon the sale to the contractor there would be no field for the operation of the tax upon the sale of such personal property; and although the owner acquires title to property placed in the structure, such title passes by operation of law. This result in no sense is construed as a sale. These points are clearly illustrated in the decisions of our Court in the cases of **Lone Star Cement Corp. v. State Tax Commission,** 234 Ala. 465, 175 So. 399, and **Wood Preserving Corp. v. State Tax Commission,** 235 Ala. 438, 179 So. 254, and a well reasoned case from Maryland cited with approval in the opinion in the **Lone Star Cement Corp.** case, supra, namely: **State v. Christhilf,** 185 A. 456 (1936); **Alabama v. King & Boozer,** 314 U. S. 1, 86 L. Ed. 3; **Curry v. United States,** 314 U. S. 14, 86 L. Ed. 9.

If there was any doubt of this construction, it was put beyond controversy by incorporating in these Acts the provision to the effect that "Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold." Such would have been the proper construction of such transaction even without the addition of the above-quoted provision.

Of course, personal property purchased by the contractor for his own use, such as tools, equipment, etc., not incorporated in any structure, are retail sales, for the reason that he is the ultimate consumer of such property.

2. Your second inquiry is whether or not the same rule applies to a subcontractor who undertakes the construction of some portion of the building or improvement required of the prime contractor. For the same reasons as above stated with reference to the prime contractor, the subcontractor is the ultimate consumer of materials used by him in the erection of a building or structure, or any portion thereof, covered by the subcontract; and the subcontractor is likewise required to pay the tax upon property or materials sold to him for the purpose of being placed in the structure or which he proposes to use in the performance of the portion of the work required of him under this contract.

3. Your third inquiry relates to the construction which should be placed upon a transaction by which a contractor or subcontractor purchases and installs equipment or machinery in the structure or building in such manner as that such equipment or machinery becomes affixed to the structure, building, or realty.

For the reason that the sale of equipment or machinery to the contractor, to be installed by him in a structure or building in such manner as the same will no longer fall within the classification of tangible personal property, is the last and final sale of the tangible personal property, as such, it is my opinion that the sale to the contractor is the retail taxable sale, as in the case of building materials, and in fact the term building materials may be construed as including such property when the construction contract provides for its installation in the structure or building.

4. Your fourth inquiry relates to personal property required to be furnished by the contractor, but which is not to be attached or affixed to the realty.

When tangible personal property is required to be furnished by the contractor, and to be delivered to the landowner, in such a manner as not to become affixed or attached to the realty, or to the structure or building, it is a sale of chattels, whether the sale price is incorporated in a lump sum or is arrived at in any other manner. The contract in such case would be divisible, partly for construction and partly for the sale of tangible personal property. Where the contractor is not engaged in the manufacture of the property to be thus furnished or sold, it is apparently contemplated that he will purchase or otherwise acquire it in his own name, and then sell and deliver the same to the landowner or person with whom he contracts. The sale of the property to the contractor not being the final sale to the ultimate consumer, but a sale for resale, would come within the definition of a wholesale sale under the terms of these Acts. The definition of a wholesale sale, as it appears in these Acts, is a sale "by wholesalers" to "licensed retail merchants, jobbers, dealers or other wholesalers for resale."

While a contractor is not ordinarily classified as a merchant, jobber, or dealer, and does not ordinarily or generally engage in the business of a dealer, the term "dealer" is broad enough to include any one who buys tangible personal property for the purpose of reselling the same; also, as the contractor in such circumstances would clearly be engaging "in business of selling at retail *** tangible personal property," such sale would be taxable under the Sales Tax or Use Tax Act. However, if the landowner or other party to the contract is the United States, the retail sale from the contractor to the United States would be immune from State taxation. The mere fact that the ultimate retail sale is to the United States does not change the rule for determining which transaction constitutes the retail sale under these Acts. The sale to the contractor (for resale as tangible personal property) would still be construed as a wholesale sale, not taxable for such reason, and the retail sale otherwise taxable would be immune from taxation upon constitutional grounds, when the United States is the ultimate purchaser and consumer of the tangible personal property involved.

5. Your fifth inquiry relates to the construction which should be placed upon transactions where the contractor or vendor is also the manufacturer of the material or property involved.

There is no doubt a difficulty at times in determining whether a contract made by the prime contractor with a manufacturer should be construed as a contract for the sale of chattels, or whether it should be construed as a building or construction contract. There are numerous cases distinguishing

between contracts for the sale of chattels and building or construction contracts, as shown by research memorandum herewith submitted.

Contracts for the sale of complex or complicated machinery or equipment installed are construed as contracts for the sale of chattels.

Contracts of manufacturers for the sale of such articles which are to be sold complete or installed, especially if requiring the services of the manufacturer in the installation or adjustment upon delivery, are construed as contracts for the sale of chattels. The installation, even though made in such manner as to affix the same to the realty, is construed as a mere incident of the sale.

For instances in which the contract was construed as a contract for the sale of chattels, see

Puffer Manufacturing Co. v. Kelly, 198 Ala. 131, 73 So. 403;

Fifteenth Street Investment Co. v. People, 81 P. (2d) 764;

York Manufacturing Co. v. Colley et al., 247 U. S. 21, 63 L. Ed. 963, 11 A. L. R. 611;

B. C. Co. v. Carlyle Paper Co., 133 Ill. App. 61;

Cobb v. York Ice Mfg. Co., 230 Ala. 95, 195 So. 811;

Southern Discount Co. v. Rose, 296 S. W. 428;

Metal Door & Trim Co. v. Hunt, 179 Okla. 240, 39 P. (2d) 72, 101 A. L. R. 350;

Palmer v. Aeolian Co., 46 Fed. 2d. 746;

Kaw Boiler Works Co. v. Interstate Refineries, 118 Kan. 693.

Building or construction contracts.

Contracts for the furnishing of labor and materials for the construction of any structure, building, or improvement upon realty, whereby the contractor is charged with producing a given result, are construed as building or construction contracts. Such a contract may also provide for the installation of certain machinery, apparatus, and equipment in the building, structure, or improvement. If the contract calls for a completed structure with such installations, it is not deemed divisible, but is construed in its entirety as a construction contract. It does not follow, however, that every subcontract which the the prime contractor makes for the performance of a part of the original contract is required to be construed as a construction contract, for the reason that the subcontract may be the mere means by which the prime contractor purchases, even though installed, certain complete units of machinery, equipment, or apparatus; and as between the subcontractor and

prime contractor, in such instances, as discussed above in paragraph four, the contract may be construed as involving a mere sale of chattels, but not so as between the prime contractor and the landowner, for the reason that the landowner has imposed upon the prime contractor a construction contract, entire and indivisible in its nature and provisions. As between the prime contractor and the landowner no sale of chattels would be involved, even though title to the completed structure and all attachments and fixtures upon completion passes from the prime contractor to the landowner by operation of law.

But a transaction between a subcontractor or vendor and the prime contractor to furnish or sell machinery, equipment or apparatus installed is construed as involving the mere sale of chattels, in the same nature as the sale of building materials to the prime contractor, and is the taxable event under the Sales Tax Act or is the basis for the tax under the Use Tax Act.

However, if the subcontract is a true construction contract, whereby the subcontractor is required to furnish the labor and materials to construct the whole or some portion of the building, structure or improvement, to produce a given result, the subcontractor occupies a position similar to that of the prime contractor, and he becomes liable for sales tax or use tax upon or with respect to all of his building materials.

The fact that a prime contractor or subcontractor under a building or construction contract uses certain building materials manufactured by him, instead of purchasing such materials at retail, does not change the rule that the contractor is liable for the tax upon building materials purchased by him. This may present a difficulty in determining the amount of the tax under these Acts. The sale of tangible personal property to a manufacturer which does not become an ingredient or component part of the product manufactured **for sale,** is defined as a retail sale and, therefore, the taxable sale. However, there appears to be a doubt as to whether the expense of subsequent processing or manufacturing before the building materials are used may be treated as a part of the cost or price of such materials to such a manufacturing contractor. We find no decisions of our Court on this question.

In the following cases, the contracts were construed as building or construction contracts, namely:

Browning v. Waycross, 233 U. S. 16, 58 L. Ed. 828;

Muller Mfg. Co. v. First National Bank of Dothan, 197 Ala. 209;

Gray-Knox Marble Co. v. Times Building Co., 225 Ala. 554, 144 So. 29;

General Railway Signal Co. v. Commonwealth of Virginia, 246 U. S. 500;

Buffalo Refrigerator Mach. Co. v. Penn. Heating & Power Co., 178 Fed. 696;

Dame v. Woods, 75 N. H. 38, 60 A. 744;

Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384.

Where the contract is for the sale of chattels, the sale is taxable under the provisions of the Sales Tax Act or becomes the basis for the application of the use tax, and if such sale is made to a contractor, even though such contract is with the United States, it is a retail taxable sale as the contractor is construed as the ultimate consumer of that which he places in the structure or affixes to the realty, pursuant to the terms of a building or construction contract. (See **Alabama v. King & Boozer,** 314 U. S. 1, **Curry v. United States,** 314 U. S. 14.)

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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RESEARCH MEMORANDUM

BY ASSISTANT ATTORNEY GENERAL HAWKINS.

* * *

CASES WHEREIN THE AGREEMENT WAS CONSTRUED AS A CONTRACT FOR THE SALE OF CHATTELS.

Puffer Manufacturing Co. v. Kelly, 198 Ala. 131, 73 So. 403, (concerning the sale and installation of a soda fountain). The court stated:

> "The question under consideration has been in various forms, a frequent subject of decision in American Courts, and the consensus of judicial opinion is that the mere installation of machinery or other apparatus, including the assembly of its complete and adjusted parts, and its erection in its place of use, is but an incident of sale, *** "

Fifteenth Street Investment Co. v. People, 81 P. (2d) 764 involved the sale and installation of elevators. The Court held:

> "That work and labor is to be done upon or in connection with the materials as an incident to or in connection with the transfer of title to the materials, does not rob the transaction of its essential characteristics of a sale if the whole or any measurable part of the consideration for the performance of the contract is compensation for the materials."

York Manufacturing Co. v. Colley et al., 247 U. S. 21, 63 L. Ed. 963, 11 A. L. R. 611, (concerning the sale and installation of machinery for ice plant).

B. C. Co. v. Carlyle Paper Co., 133 Ill. App. 61, (concerning a contract to

furnish and install machinery for paper mill).

Cobb v. York Ice Mfg. Co., 230 Ala. 95, 195 So. 811, (concerning a contract to furnish and install machinery for ice plant).

Southern Discount Co. v. Rose, 296 S. W. 428, (concerning sale and installation of an acetylene gas plant and the machinery and equipment therefor).

Metal Door and Trim Co. v. Hunt, 179 Okla. 240, 39 P. (2d) 72, 101 A. L. R. 350, (concerning the sale and installation of elevators).

Palmer v. Aeolian Co., 46 Fed. 2nd 746, (concerning sale, delivery and installation of a pipe organ).

Kaw Boiler Works Co. v. Interstate Refineries, 118 Kan. 693, (concerning the sale and installation of machinery and equipment for an oil refinery).

* * *

CASES WHEREIN THE AGREEMENT WAS CONSTRUED AS A CONSTRUCTION OR BUILDING CONTRACT.

Browning v. Waycross, 233 U. S. 16, 58 L. Ed. 828, (concerning a contract to furnish and erect lightning rods).

Walstrom v. Oliver-Watts Construction Co., 161 Ala. 608, 50 So. 46, (concerning a contract to make, deliver and lay concrete blocks). The Court held:

> " *** A contract to build a house, by which the builder is to furnish the material, whether it be wood, brick or stone, or other materials specified, would certainly not be classed as one for the sale of chattels; nor do we think that the limitation of a contract to the building of the walls out of concrete blocks, and the fact that the price is fixed at so much per block and so much for placing each in the wall, convert or change it from a builder's contract to one for the sale of a chattel."

Muller Mfg. Co. v. First National Bank of Dothan, 197 Ala. 209, (concerning a contract to furnish materials and construct certain fixtures in a bank building, erect brick walls and furnish plaster for walls).

Gray-Knox Marble Co. v. Times Bldg. Co., 225 Ala. 554, 144 So. 29, (concerning contract for the furnishing, cutting, polishing, and installing of marble in a building).

General Railway Signal Co. v. Commonwealth of Virginia, 246 U. S. 500, (concerning the sale and installation of automatic railroad signals and pole lines and buildings in connection therewith).

Buffalo Refrigerator Mach. Co. v. Penn. Heating & Power Co., 178 Fed. 696, (concerning the sale and assemblage of machinery, equipment and apparatus for an ice plant).

Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, (concerning a contract for the furnishing and installation of fans and apparatus of a ventilating system for a building).

July 6, 1943

Hon. T. C. Garner, Treasurer,

Treasurer's Department,

Jefferson County,

Birmingham, Alabama.

Jefferson County—County Commission—Local Acts 1932, page 84—

1. Expenses of Credit Manager of Jefferson Hospital incurred in attending meeting of National Association of Credit Managers in St. Louis, Missouri, is a legal claim against the county, when such trip was authorized by the County Commission of Jefferson County.

2. Membership dues of Credit Manager of Jefferson Hospital in Credit Managers Association, and expenses in attending weekly luncheon of said Association are legal claims against the county when authorized by the County Commission of Jefferson County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1943, is as follows:

"I have a voucher issued by the County Commission to Mrs. Louise Webb, covering expenses incurred by her on a trip to St. Louis, Mo. This party is Office Manager for the Jefferson Hospital, a County owned and operated institution. As a part of her duties she acts as Credit Manager, approving credit extended to any patients of the Hospital. She is a member of the Credit Managers Association of this City and was authorized to attend a convention of the National Association by the County Commission, and the voucher in question was issued to re-imburse her for the expenses incurred on this trip.

"I would like very much to be advised as to whether this constitutes a valid claim against Jefferson County and if I may lawfully pay the voucher. In addition to the above, the County Commission proposes to pay the dues of Mrs. Webb in the Credit Managers Association and I

would like to be advised as to whether such a claim is a valid one against the County.

"The Credit Managers Association meets each week in the City of Birmingham, having a luncheon at which various credit problems are discussed. The cost, or expense, incurred by Mrs. Webb in attending these luncheons is now being borne by the County. This expense consists of the cost, or price, of the luncheon in question. Will you also advise me whether this is a valid claim against the County?"

I wish to call your attention to Section 13, of Act No. 198, H. 596, approved November 3, 1932 (Local Acts of 1932, page 84), which is as follows:

"Section 13. That said Commission may at its discretion pay out of County funds the traveling or other expenses of any County officer or employe, when such officer or employe creates such expense under the order or direction of such Commission."

The first question presented by your inquiry is whether or not expenses incurred by the Office Manager of Jefferson Hospital, who also acts as Credit Manager of said hospital, in attending a meeting of the National Association of Credit Managers in St. Louis, Missouri, is a legal claim against the county where such trip was authorized by the County Commission of Jefferson County.

Assuming that the trip was on official business of the county it is my opinion that said claim is a legal claim against the county, and you may lawfully pay the voucher issued to cover the expenses of said trip. I wish to refer you to an opinion rendered to you by this office under date of August 26, 1938, and found in Quarterly Report of the Attorney General Vol. 12, page 153, in which an analogous situation was presented. In this opinion it was held that the Commissioners Court of Jefferson County had authority, under the provisions of Section 13, supra, to pay the expenses incurred by the Acting Sanitary Engineer and one of the County Commissioners of Jefferson County in attending a meeting held in New York City of the American Society of Civil Engineers and the New York State Sewage Workers Association, where such trip was authorized by said Commissioners Court.

In reference to your other two inquiries, if in the opinion of the County Commission of Jefferson County it is necessary for the Credit Manager of the Jefferson Hospital to be a member of the Credit Managers Association, and attend the weekly luncheons of said Association, it may, by proper order authorize said Credit Manager to become a member of the Credit Managers Association and attend the weekly luncheons of said Association. In such event the membership dues in the Association and the expenses of attending the weekly luncheons are valid claims against the county.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 8 1943.

Hon. B. G. Robinson,

Judge of Probate,

Pickens County,

Carrollton, Alabama.

Court of County Commissioners of Pickens County may make an appropriation from its general fund for the purpose of supplementing the salaries of the teachers of Vocational Agriculture in the high schools of the county.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of June 18, 1943, is as follows:

"At a meeting of the Court of County Commissioners of Pickens County to be held on July 12th, 1943, a petition will be presented to the Court for an appropriation from the County General Fund to supplement the salaries of the teachers of Vocational Agriculture of the six high schools of the county.

"I shall be glad to have you advise me, by that date if possible, if the Court is authorized to make an appropriation for the purpose of supplementing the salaries of Teachers of Vocational Agriculture in the high schools of the county."

In my opinion your inquiry must be answered in the affirmative.

In rendering this opinion it is assumed that you can make the stated appropriations from a surplus in the general fund and not contrary to the provisions of the "County Finance Control Act" now Title 12, Section 73, et seq., 1940 Code.

Your attention is called to Title 52 Section 388, of the 1940 Code, which is as follows:

"County and city may make appropriation for Smith-Hughes type of vocational training. Boards of revenue and courts of county commissioners of counties of Alabama are hereby authorized to make appropriations to county boards of education to be used in providing classrooms, laboratories, and shops for use in teaching vocational subjects, and for maintaining such vocational departments after they have been established; provided that such appropriations may only be made for use in any school or schools duly recognized by the state board of education as centers for vocational instruction of the Smith-Hughes type, and on account of which reimbursement is being made or is to be made during the next

fiscal year following the first payment of county funds appropriated for such purposes."

I have assumed the liberty of contacting the State Board of Education and am informed that all of the high schools of Pickens County, in which teachers of Vocational Agriculture are employed, are duly recognized as the Smith-Hughes type.

Further authorization of appropriation from the County General Fund, for the stated purposes, is found in Title 52, Section 207, 1940 Code, which is as follows:

"§ 207. Appropriation of funds out of county treasury.—The courts of county commissioners or boards of revenue of the several counties of Alabama are authorized at any meeting of said court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the county treasury for the support of the public schools within said county."

For discussion of analogous situations see Reports of the Attorney General, Vol. XV, page 332; Biennial Report of the Attorney General, 1936-38 page 3; 1930-32, page 946.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 8 1943.

Mr. C. J. Allen, Superintendent,

Calhoun County Board of Education,

Anniston, Alabama.

Libraries—Assistant librarian may be employed by county board of education with approval of county library board and his salary may be paid out of school funds.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 21, 1943, is as follows:

"The Board of Education of Calhoun County wishes your opinion

upon the question hereinafter set out, based upon the following facts:

"The Board of Revenue, or County Commission, of Calhoun County Alabama, for the past several years have maintained, in connection with the Board of Education of Calhoun County, Alabama, a free circulating library for the benefit of the citizens of Calhoun County, Alabama, and for the benefit of the public schools of said county. The headquarters of this library is in the Calhoun County court house, but through book truck service this library is made available to all the rural schools of Calhoun County Alabama. In fact, a library station is maintained at all the rural schools, and the truck has a regular schedule and calls at all of these regular schools.

"The funds for the maintenance of this circulating library have been regularly contributed by the said Board of Revenue and by the Board of Education, each contributing substantial amounts every year, although the Board of Revenue's contribution has been larger than that of the Board of Education.

"The Library Board has been appointed by the Board of Revenue, but by agreement with the Board of Education the County Superintendent of Education has been made a member of said Library Board and is Secretary of said Board. For the past several years the Library Board has been able to secure assistant librarians and other employes through the WPA. The WPA roll has been cut off, however, and at the present the library is badly in need of assistants, or workers. Under this circumstance, the Calhoun County Board of Education has been requested to make an additional appropriation of approximately $800 to $900 toward the support of the library and the securing of assistants. The Calhoun County Board of Education desires to continue its support of this circulating library, which helps to promote the public school program of the county, but said Board of Education thinks it would be to the best interests of the public schools to make this contribution by hiring an assistant librarian to work in connection with said library, with the special interest of the rural schools in mind. The Board of Education desires your opinion as to whether or not such an assistant librarian can be hired by the Board and her salary paid out of the public school funds of the county.

"We would appreciate your advice on this question at your earliest convenience."

It is my opinion that the county board of education may hire an assistant librarian to work in connection with the said library and may pay such librarian out of the school funds provided that the library board appointed by the county (Title 55, Section 283, Code of Alabama 1940) agrees to such arrangement.

Title 52, Chapter 16, Code of Alabama 1940 provides that the board of education in any county is authorized to appropriate funds to schools for the purpose of establishing, maintaining, enlarging or improving public libraries in such schools (Section 376). Section 380 of the same chapter authorizes the county board of education to establish a system of circulating libraries

in lieu of granting separate libraries to each school. Under this chapter the library board consists of the county superintendent of education and the school trustees which board is charged with the administration of the library (Section 278) including the selection of a librarian. (Section 379).

Title 55, Section 285 et seq. Code of Alabama, 1940, provide that the governing bodies of the counties may "establish and maintain or aid in establishing and maintaining free public libraries for the use of the citizens *** either separately or in connection with public schools *** ." The government and supervision of such combination library is vested in a library board appointed by the governing body of the county (Section 286).

It is clear from the statement of facts set out in your inquiry that the library in your county is a library not only for the use of the general public but also for the use and benefit of the various public schools located throughout the county.

Since the board of education contributes to the maintenance of this library by making appropriations it is my opinion that such board of education has in effect "established a system of circulating libraries" as provided for in Title 52 Section 380 and thus could hire a librarian to care for such library under the provisions of Title 52, Sections 85, 376, 380.

Thus the county board of education has chosen to "establish a system of circulating libraries" for the benefit of the rural schools in connection with the general public library established by the county governing body under Title 55, Section 285 et seq. The library board (Title 55, Section 286) is vested with the powers of government and supervision of the library in your county and in my opinion this includes the circulating or truck service feature of the library. (Title 55, Section 287).

It is to be noted that the library board (Title 55, Section 286) has "full power and authority to control the expenditure of all funds received or appropriated for such libraries; *** to provide a system of library service; to be made easily available to all citizens of the county or municipality through central library, branches, stations, book truck service, or other appropriate means, to elect a librarian and other employees, and otherwise to have full authority and power to manage and control the said library in order to carry out the full intent and purpose of this article; *** ." (Title 55, Section 287).

Thus when an appropriation is made by the county or by the board of education for establishing or maintaining a library the authority of the appropriation board then ceases and the library board then has full authority to control the expenditure of such funds. **Biennial Report of the Attorney General, 1934-1936,** p. 431. It is clear, however, that if the county board of education hires an assistant librarian the appropriation for the payment of such employee's salary is not made to the library board to be disposed of by the library board, but such appropriation, although made for the purpose of maintaining a library, is made for the payment of the salary of an employee of the county board of education. This appropriation is authorized by Title 52, Section 376 and Section 380 considered in connection with Title 55, Section 285, the latter section authorizing the county governing body to maintain libraries "either separately or in connection with the public schools."

The legislature, therefore, has contemplated that the county board of education should cooperate with the county governing body in establishing and maintaining a library. In this connection it must be stated that the power of government and supervision of the library has been vested in the library board. Title 55, Sections 286 and 287. It is for this reason that the library board must agree to the proposed arrangement, viz; the employing by the board of education of an assistant librarian. Thus the library board could exercise its power of government of and supervision over the library by accepting or rejecting the offer of the board of education to hire an assistant librarian.

That such an agreement is authorized is shown by Title 55, Section 288 wherein it is stated:

> " *** In lieu of establishing or maintaining free public libraries exclusively for a single county or municipality in the manner hereinbefore provided, the library board of any county, or municipality, free public library may contract, in behalf of the political unit represented by such local library board, to and with the library board of other political unit, or governmental agency or instrumentality, with respect to the establishment or maintenance of joint library service upon such terms as may be agreed upon by the several contracting parties. *** "

Reference is here made to an opinion of this office released September 30, 1940, XX Quarterly Reports of Attorney General, 371. This opinion held that the county board of education was without authority to make an appropriation to a county library that was in no way connected with the public schools. Since the library in the instant case is directly connected with the public schools this opinion is not applicable.

After considering all of the statutes above noted it is my opinion that an assistant librarian may be employed by the county board of education and his compensation may be paid out of the school funds of the county, but further, that the proposed arrangement must be approved by the library board appointed by the county governing body.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 10, 1943.

Hon. I. C. Heck,

State Comptroller,

Capitol.

Sales Tax—Distribution of—Public Welfare—Code of 1940, Title 51, Section 784—Act No. 82, General Acts 1943—

A sum not to exceed $650,000 per annum is available to counties for old age assistance exclusively provided counties' expenditures for public welfare purposes for the fiscal year 1942-1943 are maintained.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I am in receipt of your request for an official opinion, dated July 8, 1943, which is as follows:

"Section 784 of Title 51 of the 1940 Code of Alabama was amended by Act No. 82, House Bill No. 25, approved June 2, 1943, which act provides in part for distribution to the several counties of a sum not to exceed $650,000 per annum for old age assistance exclusively and which must be expended in addition to the counties present expenditures for public welfare purposes.

"What is the meaning of the phrase 'present expenditures for public welfare purposes'? Must the several counties expend for public welfare purposes an amount equal to their present expenditures in order to participate in the distribution of this part of the sales tax?"

Act No. 82, House Bill No. 25, approved June 2, 1943, which act amended Section 784 of Title 51 of the 1940 Code of Alabama, provides in pertinent part as follows:

"If the amount of such collections in any fiscal year, remaining after the payment of the expenses of administration and replacement of the amounts in the several funds as herein provided and distributed to the sixty-seven counties as herein provided, is greater than four million, two hundred thousand dollars, then an amount equal to one-fourth of such excess shall be divided and distributed among the sixty-seven counties of the State according to the population sixty-five years and over in age as shown by the last federal census; provided, however, that this one-fourth of such excess shall not exceed the sum of six hundred, fifty thousand dollars per annum, and provided further that this sum shall be expended by the counties for old age assistance exclusively **and in addition to their present expenditures for public welfare purposes.**" (Emphasis supplied)

A reading of Act No. 82, supra, discloses that the fiscal year is used as a basis for the distribution of the sales tax fund. State and County welfare department budgets are also set up on a fiscal year basis. It is therefore my opinion that the present fiscal year, that is, fiscal year 1942-43, should be used as a basis for determining the "present expenditures for public welfare purposes".

In view of the language of the above quoted portion of Act No. 82, supra, it is also my opinion that the several counties must maintain the present expenditures for public welfare purposes in order to participate in the allocation of this portion of the sales tax fund. Any other conclusion would nullify the expressed intention of the legislature to provide **additional** monies for old age assistance.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 10, 1943.

Hon. E. C. Ray, Chairman,

Alabama Alcoholic Beverage Control Board,

Montgomery, Alabama.

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD—

Authority of the Board to control and regulate sale of intoxicating liquors and beverages—

1. The Board has authority to limit the quantity of intoxicating liquors or beverages to be sold to any person within a named period of time.

2. The Board has authority to limit the sale of such liquors and beverages to resident citizens of the State of Alabama.

3. The Board is not authorized to limit its rationing system to residents of wet counties.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of July 2, 1943, is as follows:

"The Alabama Alcoholic Beverage Control Board finds that an emergency situation exists in Alabama respecting the handling and distribution of alcoholic beverages by this Board. The emergency is due to a rapidly declining supply of such beverages available to the Board, which results in what this Board conceives to be an unjust and unfair distribution under the system heretofore employed by the Board.

"This Board is now convinced that a more equitable basis of distribution is necessary and that such revised system must needs involve definite limitations upon the amount of such beverages that may be purchased by any person during some specified period of time.

"Accordingly, this Board is considering methods of distribution which according to its judgment would accomplish a more equitable distribution of such beverages, and such methods necessarily involve some definite changes from methods of distribution employed by this Board heretofore.

"In order that we may be advised in advance with reference to our legal authority in the premises, we are propounding to you the following questions:

"1. In this situation does the Alabama Alcoholic Beverage Control Board have the power to put the sale of alcoholic beverages upon a rationed basis, thus limiting the amount that may be purchased by any one during a specified period of time?

"2. As a part of a rationing system, does this Board have the legal right to limit the issuance of purchase permits to bona fide residents of the State of Alabama?

"3. In the issuance of permits for the purchase of alcoholic beverages under a rationing system would this Board be limited to residents of wet counties of Alabama, or should permits be issued to residents of Alabama living in dry counties as well?

"We will greatly appreciate a response at your earliest convenience in order that we may be enabled to formulate our plans without unnecessary delay."

We assume the foregoing questions are limited to the management and control of the sale of intoxicating liquors and beverages by the State Stores of the Board.

A correct answer to your questions rests upon some foundamental principles of law.

It is the accepted law of this country that a sovereign state has inherent authority through what is termed its police powers to pass laws to protect the health, morals, and the general welfare of its citizens. From early times it has been found necessary or expedient for the State through this police power to control and regulate the use of intoxicating liquors as well as the traffic therein. Through the years this control has assumed various forms

and methods. The form or method of control is a matter for the state to decide as a question of public expediency and morality. Sometimes it has been the imposition of a license tax; sometimes by restrictions as to the class of persons to whom liquor may be sold, and when and where it shall be sold; or it may be total prohibition of the sale.

One of the recognized methods of control is the assumption by the state government of the power to supply all liquors to its inhabitants. The regulation and control has become so general and has existed so long that courts may judicially notice that most free governments have made the business of selling liquor a subject of regulation. 30 **Am. Juris.**, (Intox. L.) Sections 16, 18, 21, 22, and 217. **Southern Express Company v. Whittle,** 194 Ala. 406.

The government has power to subject those members of society who might indulge in the use of intoxicating liquors without injury to themselves, to a deprivation of access to liquor in order to remove temptation from those whom its use would demoralize and to avoid the abuses and injury to the persons and society which follow in its train. 30 **Am. Juris.**, Section 21, supra.

The power of the government to regulate the use, possession, transportation, and sale of intoxicants includes the authority to prescribe reasonable rules and regulations and conditions upon which such business may be conducted. 30 **Am. Juris.**, Section 21, supra.

According to the weight of authority the state's police power extends to forbidding a citizen to receive for his individual use more than a stated quantity within a given time. **Southern Express Company v. Whittle,** 194 Ala. 406; 30 **Am. Juris.**, (Intox. L.) Section 258.

The Legislature of the State, by the Acts of 1936-37, Extra Session, pages 40 et sequi. undertook to exercise this inherent police power of the State by the enactment of an elaborate system of laws dealing with the liquor question. The opening sentence in the title to this enactment declares its purpose to be:

> "To promote temperance and suppress the evils of intemperance; to regulate and control the manufacture, purchase, bottling, selling, distribution, transportation, handling, advertising, possession, dispensing, drinking, and use of alcohol, brandy, rum, whiskey, gin, wine, beer, lager beer, ale, porter, stout and all liquid beverages and articles containing alcohol, obtained by fermentation or otherwise."

The act prescribed many general provisions on the subject and fixed standards for its administration and execution, and provided for a board to which it committed such administration and enforcement. It clothed this Board with broad and sweeping powers to make rules controlling the details of its management and execution. This law is incorporated in our present Code under Title 29, Sections 1 et sequi.

Section 2 of this title provides:

> "This chapter shall be deemed an exercise of the police power of the State of Alabama for the protection of the public welfare, health, peace

and morals of the people of the State and to prohibit forever the open saloon; and **all of the provisions of this chapter shall be liberally construed for the accomplishment of this purpose."** (Italics supplied.)

Section 5 of Title 29 authorizes the Board to buy and sell liquors or beverages and to have the same in its possession for selling and to control the possession, sale, transportation, delivery and **consumption of such liquors.**

Sections 7 and 8 of the title provide for the management of liquor stores and the sales of liquor therein. Section 6 authorizes the Board to make rules. Sections 5 and 42 prescribe the functions, duties and powers of the Board, among which are:

"To control the possession, sale, transportation, and delivery of beverages."

The last sentence in Section 18, Title 29, vests in the Board sweeping discretionary powers.

These are only some of the outstanding provisions vesting power and discretion in the Board to control the liquor traffic. The enactment throughout shows the purpose and necessity for an administrative board to deal with the management, and to control the details for enforcing the law. From the foregoing we are forced to the conclusions, first that the Board has authority to limit by the adoption of rules fixing the quantity of liquor to be sold a purchaser during a named period of time; second, that by proper rule or regulation the Board may limit sale to bona fide residents of the State of Alabama; and, third, that the Board would not be limited to residents of wet counties in the issuance of permits for the purchase of alcoholic beverages.

That it is unlawful to sell or have in one's possession intoxicating beverages in a "dry" county is well established and beyond dispute. **Code** 1940, Title 29, Section 69; **Williams v. State,** 28 Ala. App. 73, 179 So. 915. However, the prohibition is against the sale or possession of intoxicating beverages in such counties and does not prohibit the residents of a "dry" county from going into a "wet" county and there purchasing and consuming or possessing intoxicating beverages. The local option plan is based upon the territorial confines of the county and not on the basis of whether a person is a resident of a "wet" or a "dry" county. It is unlawful for a resident of a "wet" or a "dry" county to possess intoxicating beverages in a "dry" county. Likewise, it is not unlawful for a resident of a "dry" or "wet" county to possess intoxicating beverages in a "wet" county, provided, of course, the intoxicating beverage is purchased lawfully under the Alcoholic Beverage Control Act.

A regulation of the Alcoholic Beverage Control Board limiting the issuance of permits for the purchase of alcoholic beverages, under a rationing program, to bona fide residents of "wet" counties only would, in my opinion, unlawfully discriminate against residents of "dry" counties and would not be authorized by Section 6, Title 29, of the 1940 Code.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 13, 1943.

Hon. Henry W. Sweet,
County Commissioner,
Jefferson County,
Birmingham, Alabama.

Counties—Merit System—Personnel Board—

Personnel Board has authority to reinstate an employee with pay.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1943, is as follows:

"The County had an employee who was dismissed by the County Commission, whereupon this employee appealed to the Civil Service Board for a hearing.

"After a public hearing before the Civil Service Board, this employee was reinstated and her salary paid for the term that she did not work, this being the time between the taking of the appeal and the order made by the Civil Service Board reinstating her.

"I would like very much to be advised as to whether the Civil Service Board has the right and authority to order employees reinstated with **pay** over the protest of the County Commission."

It is my opinion that your inquiry should be answered in the affirmative.

The Civil Service System for Jefferson County is provided for by Chapter 12, Title 12, of the 1940 Code of Alabama. Section 154 of Title 12 deals with dismissal and suspension, and provides in part as follows:

"The Board must after investigation order a public hearing and if the charges are proved unwarranted, order the reinstatement of the employee **under such conditions as the Board may determine.**" (Underscoring supplied.)

It is my opinion that in view of the above-quoted portion of Section 154 the Board may order the reinstatement of the employee and provide as one of the conditions that he receive pay for the period of time between his dismissal and reinstatement.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 19, 1943.

Miss Lena Miller, Register,

Circuit Court of Montgomery County, In Equity,

Montgomery, Alabama.

1. If the salary of an officer who seizes any gambling device is paid him in lieu of all compensations and allowances for his services as such officer he is not entitled to receive one-half of the money taken from such gambling device as provided by Section 288 of Title 14 of the Code of 1940 but the entire amount should be paid into the general fund of the County in which said gambling device was found and seized.

2. Neither the Sheriff of Montgomery County, Alabama, nor any of his salaried deputies are entitled to receive any part of the money taken from any gambling device seized by them in Montgomery County, Alabama, but the entire amount should be paid into the County Treasury of Montgomery, Alabama.

Opinion by Assistant Attorney General Savage.

Dear Madam:

Your request for an official opinion, bearing date of June 17, 1943, is as follows:

"In my official capacity as Register of the Circuit Court of Montgomery County, In Equity, I desire to ask your opinion and ruling upon the following question, which has come up before me officially:

"Code of 1940, Title 14, Section 288, relating to the disposition of contents of gambling devices, provides that one-half of the money taken from the gambling devices be paid to the officer making the seizure. In Montgomery County the officer who made the seizure is on a salary basis, and the Examiner of Public Accounts contends, for that reason, cannot be paid this money.

"Does Title 14, Section 288, prevail over Montgomery County Salary Amendment? (Code 1940, Vol. 1, p. 300, Amendment IV). Shall I pay the money hereinabove mentioned to the officer who made the seizure, and if not, what disposition shall be made of same."

With reference to the disposition of the money to be made by you as Register, taken from the gambling device, please be advised that it is my opinion that if the salary of the officer who made the seizure is paid him in lieu of all compensations and allowances for his services as such officer, then such officer is not entitled to any part of the money taken from the gambling device, but the entire amount should be paid into the general fund of the county in which said gambling device was found and seized.

In your request for this opinion you did not advise what office the officer who made the seizure holds. You do refer to Amendment IV of the Constitution of Alabama of 1901, which is designated as "Montgomery County Salary Amendment." This Amendment provides for the payment to the sheriff and certain of his deputies of salaries in lieu of all compensations and allowances for the performance of their duties as such officers. This amendment also provides that the Legislature of Alabama may from time to time, by local or general laws, fix, regulate and alter the amount of the salaries and allowances of such officers, including the method and basis of their compensation; also the Legislature is authorized to fix, regulate and alter the amount of compensation received by the Sheriff and all other county officers of Montgomery County, Alabama.

By Local Acts of 1939, Page 44, the salaries of the sheriff of Montgomery County, Alabama, and his deputies were fixed and such act specifies that such salaries are in lieu of all other salaries, fees and emoluments they are to receive as such officers. It is my opinion therefore, that should the officer who made the seizure of the gambling machine be the sheriff or one of his salaried deputies of Montgomery County, Alabama, he would not be entitled to any part of the money found in such gambling device, but the entire amount should be paid into the County Treasury of Montgomery County, Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 21, 1943.

Hon. Joe N. Poole,

Commissioner of Agriculture,

Department of Agriculture,

Capitol.

Agriculture and Industries—

Commissioner may employ special agents to investigate violations of Hare Anti-Cattle Rustling Act. (Title 2, Sections 384-394.)

Arrests—Special agents employed by Department of Agriculture and Industries have same authority as private persons in making arrests.

War Emergency Act (Gen. Acts, 1943, No. 185, H. 66)—does not empower Governor to authorize Commissioner of Agriculture and Industries to employ special agents having powers and authority of officers of the law.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 9, 1943, is as follows:

"Will you please advise me whether or not, as Commissioner of Agriculture, I have authority to enforce what is known as the Hare Anti-Cattle Rustling Act by employing special agents whose duty it will be to trace down cattle thieves and make arrests wherever they may find them.

"Several days ago while I was in conference with the Governor he requested that I ask this opinion and further states that if I did not have authority under this Act, perhaps he, as Governor, would have the authority under his War Emergency Act, which has been passed recently, and that he in turn would authorize me to have this work done."

The Hare Anti-Cattle Rustling Act (1936, Ex. Sess. p. 222) to which you refer appears in Title 2, Sections 384-394, Code of Alabama 1940.

In short this act provides that dealers, as defined in the act, in livestock shall apply for and pay for a permit before engaging in business. It further provides that on purchasing livestock the dealer shall obtain a bill of sale which bill of sale must accompany the livestock while being transported, and that such bill of sale must be exhibited to any officer of the law on demand. There is a further provision prohibiting sales of livestock between sunset and

sunrise. The act is not applicable to persons buying or transporting livestock, when such sale or transportation is for the purpose of grazing, feeding or milking. The commissioner is given authority to promulgate rules and regulations, and a violation of such rules may be punished by a revocation of the dealer's permit. A system of registration of brands is provided for, and the agents of the Commissioner of Agriculture and Industries are authorized to inspect livestock for the purpose of identifying. It is made unlawful to brand over an old brand or to alter identification marks.

Section 390 of this subdivision provides:

> "Any person violating any provision of this subdivision shall be guilty of a misdemeanor."

It is my opinion that the Commissioner of Agriculture and Industries is charged with the duty of administering the provisions of the above noted sections, and it is within his power to employ agents for the purpose of investigating violations of the provisions of the above noted sections. Title 2, Section 23, provides:

> "The commissioner shall, with the approval of the State Board of Agriculture and Industries, and as otherwise provided by law, appoint such chiefs, assistants, deputies, agents, experts and other employees as are necessary for the successful administration of the affairs of the department, and prescribe their duties. Said employees shall execute to the state such official bonds as the commissioner may determine and require, unless otherwise expressly provided by law."

Thus it is evident that agents may be employed to administer the provisions of the Hare Anti-Cattle Rustling Act, supra. A further discussion relating to the authority and power of the proposed special agents and particularly to their authority to make arrests is necessary.

I find no authority conferred by the legislature upon the Commissioner of Agriculture and Industries to appoint peace officers, or law enforcement officers, or officers having the powers of sheriffs or constables or policemen. Neither is there a provision in the War Emergency Act (Gen. Acts 1943, No. 185, H. 66) conferring upon the Governor the power to authorize the Commissioner of Agriculture and Industries to appoint such law enforcement officers. And further, it is my opinion that the power conferred upon the Chief Executive by Title 55, Sections 374-378 is not sufficient to authorize appointments of officers to perform the duties you propose in your inquiry.

Therefore, the Commissioner of Agriculture and Industries may appoint special agents or employees, but such empolyees could not be clothed with the authority of officers of the law without legislative provision therefor. Such agents or employees would have the same authority to make arrests as that of any private individual:

> "When private person may arrest.—A private person may arrest another for any public offense committed in his presence; or where a felony has been committed, though not in his presence, by the person arrested; or where a felony has been committed, and he has reasonable cause to

believe that the person arrested committed it; an arrest for a felony may be made by a private person on any day at any time." Title 15, § 158.

(See also code sections following above.)

You are also advised that any violation of the Hare Act (Title 2, Sections 384-394) is a misdemeanor and is prohibited by law. Title 2, Section 390. A violation of said sections constitutes a "public offense," since a public offense is defined as, "an act or omission forbidden by law, and punishable as provided in this Code." Title 1, § 5. Cf: Berry v. State, 27 Ala. App. 507, 511, 175 So. 407. Caudle v. Sears, Roebuck & Co. 236 Ala. 37, 182 So. 461; Sanders v. Davis, 153 Ala. 375, 44 Co. 979; Suell v. Derricott, 161 Ala. 259, 49 So. 895, 901; Daniels v. Milstead, 221 Ala. 353, 128 So. 447; Cary v. State, 76 Ala. 78; Burgess v. State, 44 Ala. 190, 192; Lindsey v. State, 48 Ala. 169, 170; Ex parte Pepper, 185 Ala. 284, 64 So. 112, 116; Starnes v. State, 30 Ala. App. 156, 2 Co. 2d 333; Gambill v. Fuqua, 148 Ala. 448, 42 So. 735; Haynes v. Mitchell, 69 Ala. 452.

It is my opinion that a special agent employed by your department could arrest violators of the Hare Anti-Cattle Rustling Act because a violation thereof is prohibited by law and is therefore a "public offense." **Before such agent has authority to make an arrest for the violation of said act the violation must take place in the agent's presence.** This agent would not make the arrest by virtue of any power conferred upon him by the Department of Agriculture and Industries; but he would be authorized, as are all private persons, to arrest for the commission of a public offense committed in his presence.

This holding is not in conflict with the opinion rendered in 20 Quarterly Report of the Attorney General, 267 (1940) since that opinion held that agents of the Alabama Alcoholic Beverage Control Board could neither execute warrants of arrest nor arrest for violations of the Alabama Beverage Control Act. It must be assumed that the opinion referred to held that the Board's agents, as such, could not make arrests for violations committed out of their presence.

You are further advised that stealing cattle is a felony and that cattle thieves are felons. Title 14, § 331. Likewise, the stealing of a hog or other animal of the value of twenty-five dollars or more is grand larceny and a felony. Therefore, any private individual, including the agents employed by your department, has the authority to arrest another when **in fact a felony has been committed** either in or out of the presence of the arresting person and such person **has reasonable cause** to believe that the person arrested committed that felony. Title 15, § 158, supra.

My conclusions are:

1. That you may employ special agents to investigate violations of the Hare Anti-Cattle Rustling Act.

2. That such agents would have the same authority to make arrests as that of private individuals.

You are further advised that the Governor is authorized to commission

members of the Highway Patrol as peace officers and when so commissioned the officers have the power of peace officers and may exercise such powers anywhere within the state. Title 36, § 71. See 20 Quarterly Report of the Attorney General, p. 267, 268; 21 Quarterly Report of the Attorney General, 118.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 23, 1943.

Hon. G. H. Howard,

Judge of Probate,

Elmore County,

Wetumpka, Alabama.

Chief Deputy Sheriff, Elmore County, entitled to not exceeding $100.00 remuneration for use of personal automobile during the month of June, 1943, commencing on the 18th day thereof, provided necessary mileage was travelled in performance of his duties, under local act providing for remuneration at 5 cents per mile not to exceed $100.00 in any one month.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion bearing date of July 6, 1943, is as follows:

"During the recent session of the legislature, a local bill was passed for Elmore County providing for the payment to the Chief Deputy Sheriff, mileage at 5c per mile not to exceed $100.00 in any one month while furnishing his own transportation on official business for the county.

"The above local bill was approved by the Governor, June 18, 1943. Can Elmore County pay the entire amount of $100.00 for the last 13 days in June, provided the necessary mileage was actually travelled in performance of his duties or should it be prorated on the basis of 13/30 of the $100.00?"

In my opinion Elmore County may pay the Chief Deputy Sheriff 5 cents per mile for all necessary miles travelled in performance of his duties during the month of June, commencing on the 18th day thereof.

Volume 62, Corpus Juris, page 968, defines a month as:

"A definite period of time, commencing on the first day thereof and ending on the twenty-eighth, twenty-ninth, thirtieth, or thirty-first day; *** "

" 'Calendar month' means a month as designated in the calendar, without regard to the number of days it may contain. *** "

The pertinent part of Section II is as follows:

"The said Chief Deputy Sheriff shall be paid for such mileage as provided for in the preceding section each month for the number of miles so travelled during the preceding month *** ."

The wording of the act expresses a manifest intent by the Legislature to provide the remuneration for each month, not for each month's time, or each thirty day period. It therefore follows that the Chief Deputy Sheriff may be remunerated not exceeding $100.00 for mileage travelled after the eighteenth day of June, 1943.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 23, 1943.

Hon. Hayse Tucker,

Director of Finance,

State Capitol,

Montgomery, Alabama.

State Insurance Fund—Director of Finance—Title 28, Sections, 317, 328. Code 1940.

The Director of Finance has no authority to suspend or cancel fire and tornado insurance on the State's property.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of July 6, 1943, is as follows:

"We will appreciate your official opinion on a question which has come up concerning the State Insurance Fund.

"There have been circumstances when due to fault of custodian of State insured buildings there have been unusual insurance hazards created. Some instances of such hazards have been found in school buildings where there have been found faulty flues, collection of rubbish or excessive use of oils on the floors. Under such circumstances has the Department of Finance, as administrator of the State Insurance Fund, the right to suspend the insurance? Under the same circumstances, would the Department have the right to cancel insurance carried with this fund?"

The questions posed in your inquiry call for an interpretation of an act creating the State Insurance Fund, which act appears in the 1940 Code of Alabama as Title 28, Sections 317-328.

There is a mandatory provision of law that all State-owned buildings, property, equipment, furniture, fixtures, or supplies or buildings in which the State has appropriated moneys for the erection or equipment thereof, must be insured against loss by fire or tornado. Title 28, Section 317, Code 1940.

The State carries its own risk on these properties through the medium of the State Insurance Fund at actual cost. While the law clearly defines the functions of the State Insurance Fund, its fundamental concepts are focalized in the saving effected through the performance of those functions, particularly as it affects the taxpayers of Alabama. In other words, as the State Insurance Fund progresses in the manner provided by law, the saving to taxpayers increases. If this process goes on, it at once appears mathematically possible, that in the course of time the net earnings of the fund will be self-sufficient to insure all State properties without further premium charge.

This fund was created for the sole purpose of insuring all State-owned properties against the perils of fire and tornado. The power to cancel or suspend the insurance on any of the State properties is nowhere to be found in the Act of the Legislature creating said fund. To hold that the Director of Finance has the power and authority to cancel or suspend insurance on State property would be tantamount to reading something into the law that the law makers themselves wisely omitted. This cannot be done. To allow the Director of Finance to suspend or cancel insurance on State-owned properties would subject the enforcement of the Statute to the capricious notions of a possible new Director of Finance every four years and would amount to an emasculation of the plain and mandatory provisions of the law as contained in Title 17, Sections 317-328, Code of 1940. It is essential to the execution of the scheme or purpose of the act that State-owned properties be adequately covered by fire and tornado insurance at all times. Any other course would defeat the very purpose of the statute.

The Director of Finance is empowered by law (Title 28, Section 327) to prescribe the forms of policies, etc., to be used in carrying out the provisions of this Statute. Under and by virtue of the authority conferred by Section 327, supra, the Director has prescribed or adopted a form of policy for insuring the State's property (Standard Fire Insurance Policy of the State of Alabama). On page two of said form, lines 52-56, appear the following provisions or terms, to wit:

"This policy shall be cancelled at any time at the request of the insured; or by the Department by giving five days' notice of such cancelation. If this policy shall be canceled as hereinabove provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Department retaining the customary short rate; except that when this policy is canceled by this Department by giving notice it shall retain only the pro rata premium."

It is obvious that the above-quoted provisions or terms of the policy prescribed or adopted by the Director of Finance would practically nullify the statute here under consideration and are null and void. The Legislature could not have intended any such result.

"In other words, the inquiry is as to the legislative intent, and that may be found not only in the express terms of the statute but also may be implied from the several provisions thereof. Thus, an agreement will not be enforced where it conflicts with the general policy and spirit of the statute which governs it although there may be no literal conflict." Am. Juris. "Contracts," Section 160, Page 656.

The premises considered, it is my opinion that the Director of Finance has no authority to suspend or cancel fire and tornado insurance on the State's property for any reason.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 23, 1943.

Hon. Hayse Tucker, Director,

Department of Finance,

Capitol.

State Insurance Fund—Code, Title 28, Sections 317 et sequi—

1. Under this article the county superintendents of education have authority, and it is their duty, to acquire insurance policies to cover loss by fire or tornado on all State-owned school buildings, or school buildings, whether owned by the state or not, for which the State has appropriated money for their erection or equipment and of property, equipment, furniture, fixtures, or supplies belonging to such buildings or stored therein for school purposes where the county board of education, through its county superintendent, is using or has control thereof for the use of the public schools of the county.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of June 30, 1943, is as follows:

"Re: State Insurance Fund carrying insurance on County-owned school buildings and contents.

"Section 317, Title 28, Code of Alabama of 1940, reads as follows:

" 'There shall be a fund to be known as the state insurance fund to be carried by the treasurer for the purpose of insuring against loss by fire or tornado all state owned buildings or buildings in which the state has appropriated moneys for erection or equipment thereof, or property which may have been deeded to the state, and all property, equipment, furniture, fixtures or supplies belonging to or stored in said buildings, and any and all properties of such nature as hereafter may be acquired by the state. (1923, p. 769)'

"You will note that this section uses the following words, to-wit, 'or buildings in which the State has appropriated moneys for erection or equipment thereof *** '

"(1) Does this section give the County Superintendent of Education, County Board of Education, or State Superintendent of Education authority to insure a building with the State Insurance Fund where the title is vested in the County and the State appropriated money for the erection thereof?

"(2) Does this section give the County Superintendent of Education, County Board of Education, or State Superintendent of Education authority to insure the contents or equipment of a building where the title to the building is vested in the County and the State appropriated money for the equipment thereof?

"You will further note that this section reads as follows, to-wit, 'or property which may have been deeded to the state, and all property, equipment, furniture, fixtures, or supplies belonging to or stored in said buildings, *** '

"(3) Does this section give the County Superintendent of Education, County Board of Education, or State Superintendent of Education authority to insure the property, equipment, etc., with the State Insurance Fund where the title to the property, equipment, etc., is vested in the County, and said property, equipment, etc., is stored in a building where the title to said building is vested in the State?"

Your letter involves two primary questions:

First, what property, title, and interest there is to be insured?

Second, On whom rests the authority and duty to apply for and take out contracts of insurance?

We will consider the questions in the order named. Said Section 317, is reasonably clear as to the property or interest to be insured. There is no doubt that it includes, (a) all state owned buildings, (b) all property which may be deeded to the State. It is equally clear that it includes all buildings in which State money has been appropriated and expended in the erection or equipment of such buildings, although the title to the buildings may not be in the State. The word, "equipment" here means anything provided for the efficient service; that is to say, outfitting the building adequately for the services for which the building is intended.

Continuing the statute provides for insuring "all property, equipment, furniture, fixtures, or other supplies **belonging to or stored in** said buildings." (Italics supplied)

In my opinion this clause refers to and requires that all property, equipment, furniture, fixtures, and supplies that belong to any of the buildings named above in the statutes be insured.

The expression "belonging to" is not used in the sense of ownership, but rather means all property, equipment, furniture, or supplies used in such building in performing the services for which the buildings are being used.

The word "stored" refers to equipment, furniture, fixtures, or supplies which are located in such buildings and are not in actual use which constitute a stock laid away for future use—a source from which such equipment, furniture, fixtures, or supplies may be drawn as and when needed in the performance of the prescribed services to be rendered in said buildings.

The second question named in the beginning of this opinion is not as plainly and adequately answered by the law as might be desired. We are to be here understood as considering building, property, etc., devoted to public school purposes.

Code, Title 52, Section 101, charges the county board of education with the duty of seeing that every school building whose title is vested in the State, county or school district is insured. Standing alone, it appears that these provisions are limited first to buildings and, second, as to where the title of such buildings is vested. This does not cover all the property or interest covered by Title 28, Section 317 of the Code.

Section 74 of Title 52 of the Code provides that the county board of education shall exercise through its executive officer, the county superintendent, control and supervision of the public school system of the county.

Section 116 of this Code Title makes it the duty of the county superintendent to recommend a building program adequate to all present and future needs of the schools in the county.

Section 117, immediately following, makes provision for condemnation of unfit school buildings, and makes it the duty of the county superintendent to recommend repairs, purchase of school grounds, school sites, and buildings to be erected **with State, county, and local aid,** and makes it his duty to see that plans and specifications of the State Board of Education with reference to the erection, repair, and equipment of the school buildings are followed.

Section 102 of this Title 52 makes the county superintendent of education the chief executive officer of the county board of education and also its secretary. Under the article dealing with this State Insurance Fund we find some applicable provisions bearing on the question under consideration.

Section 322, Title 28, requires that all premiums shall be paid to the Department of Finance by the treasurer of the several institutions and the county superintendent of education.

This section seems to provide that where there is no treasurer of an institution or department that the department heads of the State pay the premium. This last provision is conjoined with the **further provisions:**

"and the county superintendent of education of the several counties."

This provision certainly does not intend that so far as school property is concerned that the State Department of Education and the county superintendent of education shall each pay premiums on the same property. On the contrary, it seems to exclude from its provisions the head of the Department of Education, and confer the obligation to pay on the county superintendent.

When all these cited sections are considered and construed together in the light of the purposes of the State Insurance Act, as stated in Title 28, Sections 317, et sequi, and also in view of the expanding system of public schools in this state, we think that it is reasonably clear that the county

superintendents have authority and it is their duty to provide for insurance policies on the property, buildings, and interest provided for in Section 317, Title 28, of the Code, where the described buildings and equipment, furniture, and fixtures or supplies shall belong to, or are stored in, such buildings and used by or are under the control of the county superintendent for public school purposes of the county.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 23, 1943.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

County Board of Equalization—Jefferson County—Title 51, Sections 83 and 135, Code of 1940.

1. Upon a decrease in the amount of assessment by the County Board of Equalization on reopening of the assessment because of taxpayer's failure to receive notice, the tax assessor is not authorized to enter such decrease on authority of a letter from the said Board, rather, such entry is made on the tax return list by the members of the Board over their signatures.

2. The tax roll furnished tax collector of Jefferson County may not be changed by him under such circumstances on the authority of a letter from the Board of Equalization; such change must be made by the tax assessor who compiled the tax roll as provided by statute.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of June 21, 1943 is as follows:

"I respectfully request your official opinion on the following:

"When the Board of Equalization reopens a case for rehearing, as set out in Section 135, Title 51, page 92, of the Revenue Laws of Alabama, that the taxpayer shall have the right at any time before the taxes be-

come delinquent to appear before the county board of equalization and have the assessment of his property reopened, if satisfactory proof is made that the taxpayer or his agent did not receive notice of such increase. Also, if the assessment has been erroneously increased by placing improvements thereon which should not have been taxed until the following year. In the event that the board should revalue and lower the assessment between the period of the final hearing and December 31st (before the taxes become delinquent) are we, or the tax assessor, or collector, authorized and protected in granting this reduction by a letter of credit from the board of equalization the same as when a case has been appealed to court and the court order authorizes the reduction? The assessor's charge has been made and delivered to the tax collector before October 1st."

My answer to your inquiry is in the negative. The procedure by which property is evaluated for the purpose of assessment is governed entirely by statute. It is necessary that the statutory provisions be strictly followed. I find no legal authority for the change of an ad valorem tax assessment, either by the tax assessor or the tax collector, pursuant to a letter from the Board of Equalization stating that upon rehearing of a taxpayer's assessment the evaluation has been decreased.

Title 51, Section 135, Code of 1940, the statute to which you refer, authorizes the reopening of the assessment of a taxpayer's property before the taxes become delinquent upon satisfactory proof that the taxpayer did not receive notice of an increase in such assessment. Although the manner in which the tax assessor is notified of a decrease in the assessment upon such rehearing is not designated, the said statute does require that the original evaluation of the property by the Board of Equalization shall be entered on the tax return list and the correctness thereof certified by the signatures of the members of the Board. It is provided further that the said tax return list showing such assessment shall be delivered to the tax assessor. It is my opinion that the same procedure must be followed where the Board of Equalization has changed the evaluation upon a reopening of the assessment, i. e., the members of the Board of Equalization shall enter the revised evaluation on the tax return list and by their signature certify to the correctness of such revised evaluation.

Furthermore, it is my opinion that the tax collector has no authority to grant the taxpayer such reduction merely upon receipt of a letter from the Board of Equalization stating that the taxpayer's assessment has been decreased. Title 51, Section 83, Code of 1940, applicable to Jefferson County, provides that after the assessments have been completed the tax assessor shall prepare a tax roll showing the name and address of each taxpayer, with spaces for the amount of taxes, interest, fees, etc., such tax roll to be delivered to the tax collector on or before the 15th day of September. Upon receipt of this tax roll it is the duty of the tax collector to collect the amount of taxes stipulated therein. The tax roll also designates the amount of fees to be paid for collection and assessment of taxes. Therefore, when the Board of Equalization has decreased the amount of the assessment, evidenced by a certificate of such fact on the tax return list, it is my opinion that the duty then devolves upon the tax assessor to make a similar change on the tax roll which he had theretofore furnished the tax collector under the pro-

visions of the said Section 83.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 27, 1943.

Hon. D. Hardy Riddle,

Judge of Probate,

Talladega, Alabama.

Trailer Camps—Operators not required to obtain motor vehicle storage license (Title 51, Section 468) under facts set out.

Licenses—Trailer camp operator making charge for furnishing services viz., electricity, water and sanitary disposal facilities, held not in business where "a charge is made for storage of motor vehicles." Title 51, Section 468."

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 17, 1943, is as follows:

"We have received several applications for the refund of license money collected under Title 51, Section 468 'Automobile storage other than in garages' on so called 'Trailer Camps.'

"The facts on which the refunds are sought and the reasons why the payments were erroneous as stated in the applications for refunds are as follows:

" 'That the license collector for the Probate Judge erroneously collected parking lot licenses under the parking lot schedule Title 51, Section 468 for trailer camps. The parking lot schedule is not applicable to trailer camps. The legislature has not placed a license upon trailer camps as yet. Trailer camps furnish a service such water, lights and sanitary disposal and make no charge for the parking of automobiles.'

"These are the reasons given by the applicant why he should have a refund.

"The contention of our License Inspector is that these trailer camps were also automobile storage lots in that there was an automobile parked there for practically every trailer, that is the motor vehicle which pulled it. That the lots were divided off into spaces for the storage of the trailer and automobile and that there was an attendant there 24 hours a day. That the water, lights and sanitary disposal were furnished as incidental services.

"We would like to have an official opinion from your office at your earliest convenience as to whether or not Section 468, Title 51, applies to the conditions as stated in the facts given by our License Inspector.

"I would also like to have your official opinion as to whether or not this section would apply to 'Trailer Camps' where no motor vehicles are parked if your answer to the preceding paragraph is in the affirmative."

It is my opinion that trailer camp operators as described in your statement are not required to purchase a motor vehicle storage license, and if said license has been procured by such operator because of a mistake or error on the part of the judge of probate such operator is due to have a refund. Title 51, Section 468; Title 51, Section 848.

The General Acts of 1919, page 401, Schedule 11 of Section 361 provided for a license tax "For each garage where a charge is made for the storage of motor vehicles." In 1931 it was decided in an opinion of the Attorney General that this license tax did not apply when the automobile or motor vehicle was stored in an open space or lot, since an open space is not a garage. **Biennial Report of Attorney General,** 1930-1932, page 228. In 1935, the legislature enacted the license tax now under consideration as follows: (Title 51, Section 468)

"§ 468. **Automobile storage other than in garages.**—For each lot or place other than a storage garage where a charge is made for storage of motor vehicles shall pay the following annual license; *** "

Thus a license was levied upon operators who stored motor vehicles in open lots. In my opinion, the legislative history of the enactment of this license tax shows that it was passed so that persons charging for storing motor vehicles could be taxed whether the storage was indoors or outside.

When a trailer is towed into a camp or park and is there parked and lived in and a fee is paid to the proprietor of the camp for certain services, including electricity, water and sanitary disposal facilities, it is my opinion, after considering all of the facts set out, that such charge does not include a storage charge. "'Storage' is the act of depositing in a store or warehouse (or lot in this case) for safe keeping." **Bandosz v. Daigger & Co.,** 225 Ala. App. 494, 499. 40 **Words and Phrases,** 216. Something quite different from storing a trailer is being done by the camp operator. Something quite different from storage is sought by the trailer occupant. The charge made, therefore, does not include a charge for storing the trailer.

An analogous situation occurs at some of our "Drive-in" or automobile moving pictures. A charge is made for allowing the motor vehicle and its

occupants to park on the inside of a lot and witness a moving picture. As a necessary incident of this business the motor vehicle is parked—but no one would contend that the theatre operator was storing motor vehicles and should take out a license therefor. The drive-in theatre operator furnishes entertainment for which he charges—the trailer camp operator furnishes electricity, water and sanitary facilities for which he charges—a necessary incident of both businesses is the parking feature, but this is not what the charge is made for nor is it charging for storing motor vehicles within the meaning of Title 51, Section 468.

The fact that the trailer is drawn into the camp by an automobile and that that automobile is detached from the trailer and parked near the trailer on the same lot does not necessarily show that when the camp operator makes a charge admittedly for certain services to the trailer, including electricity, water and sanitary disposal, that such charge includes an amount in payment for the storage or parking of the automobile. Unless it can be said that a part of the charge made is for the storage of the automobile the camp operator should not be required to take out a license.

The license inspector contends that a charge is made for the storage of the automobile and that the services furnished the trailer and its occupants are incidental. On the other hand, the camp operator contends that the charge made is for the utilities furnished and that the automobile is stored or parked free of charge. Of course, the question to be decided is one of fact, and the conclusion as to whether or not a charge is made for the storage of the automobile would be different for each particular case depending on the particular facts.

From the facts you have set out it is my opinion that no charge is made for the storage of the automobile in the trailer camp. The camp operator derives his profit from a charge made for furnishing services to persons living in the trailer. It is more reasonable to believe that these camp operators make their charge solely for services furnished—such as electricity, water, and sanitary disposal than to believe that they include in the charge an amount for the storage of the automobile. As an example, suppose one rented to another a room in his house with the right to park his automobile in the back yard, could it be said that the lessor was making a charge for the storage of a motor vehicle? I think not. Suppose a hotel furnished free parking space to its guests, could it be said that the hotel was charging for the storing of motor vehicles?

In my opinion when a trailer camp operator has a lot for parking trailers and makes a charge for furnishing electricity, water and sanitary disposal facilities, it is reasonable to believe that no charge is made for parking or storing the automobile accompanying the trailer or the trailer itself and therefore no license is due under Title 51, Section 468, and if such license has been paid it may be recovered under Title 51, Section 848, or otherwise as provided by law.

In an informal opinion given by this office on February 5, 1943, to an attorney of this state, the conclusion reached was the same as that given above.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 28, 1943.

Hon. Joe N. Poole, Commissioner,

State Department of Agriculture and Industries,

Capitol.

Contributions from agricultural fund cannot be made to stock shows.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of July 26, 1943, is as follows:

"It is my understanding that the agricultural fund is to be used for certain specified things as set out by law. I should like to have your opinion on the following question:

"Do we have any right under the law to contribute money to the various stock shows which may be held over the state?

"With reference to the control of the agricultural fund, Section 34 of the Agricultural Code reads as follows:

"The commissioner of agriculture and industries, with the approval of the state board of agriculture and industries, shall use the agricultural fund in accordance with the provisions of law for the support and expense of the regulatory, control and administrative work of the department of agriculture and industries, and in such manner as said board deems will best effect the purposes of all laws included in this chapter. The commissioner of agriculture and industries, with the approval of the state board of agriculture and industries, shall direct the expenditures of said fund, it being the purpose hereof to vest the financial supervision and control over the use of said fund for the work and activities assigned to the department of agriculture and industries in the manner provided by law.

"I shall appreciate it if you will give us a ruling on the question as soon as possible."

In my opinion your inquiry must be answered in the negative.

Title 2, Section 33, Code 1940, must be construed in pari materia with Section 24, and pertinently reads, after prohibiting certain expenditures of the agricultural fund, as follows:

"Said fund shall be expended exclusively for the expenses of the regulatory control and administrative work of the department of agriculture

and industries, except as otherwise **expressly provided by law.**" (Underscoring supplied)

In **Goode v. Tyler,** 237 Ala. 106, 186 So. 130, it was held that authority to expend public funds was required to be authorized by law, either directly or by necessary implication. The last clause of Section 33 eliminates all authorization by way of implication, as to expenditures of the agricultural funds, except that necessary to effectuate statutory provisions. A diligent examination of the Agriculture Code fails to disclose either express or implied authority to make the expenditure or donation you mention. Also, the Code section you cite limits expenditures to those for work and activities assigned to the department of agriculture and industries in the manner provided by law. The support or partial support of stock shows is not so assigned.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 28, 1943.

Hon. S. E. Boozer,

Judge of Probate, Calhoun County,

Anniston, Alabama.

Licenses—Billiard Rooms—Transfer.

On sale of billiard room, license may not be transferred under provisions of Title 51, Section 840 (b), but must be surrendered and new license issued under provisions of Title 14, Section 240.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of July 22, 1943, is as follows:

"On October 30, 1942, this office issued Privilege License number 1053 to Mr. Freeman W. Hedgepath of Jacksonville, Ala. to operate a pool room in that place. Mr. Hedgepath filed proper bond and affidavit.

"Later Mr. Hedgepath sold his pool room to Mr. C. A. Chambers of Talladega, Ala. and relinquished personal supervision to Mr. Chambers. Mr. Chambers filed proper bond and affidavit with this office but did not secure proper license, according to the License Inspector of this county.

"The License Inspector of this county has cited Mr. Chambers and claims that he should pay a license for that part of annual license due after giving credit for unused portion of the license purchased by Mr. Hedgepath. He cites as his authority for this Title 14, Paragraph 240 of the 1940 Code of Alabama and the opinion of the office of the Attorney General as found in Volume XXIII, for period from April 1, 1941 to June 30, 1941, on page 16.

"Mr. Chambers protested this payment and wrote to Mr. Harry Simon, Chief of Privilege License Division of the State Department of Revenue, asking for information and citing the above reference to Title 14, Paragraph 240 and the Attorney General's opinion referred to above. Mr. Simon replied and sent a copy of his letter to the License Inspector of this county, in which he advised that this license issued to Mr. Hedgepath could be transferred to Mr. Chambers upon payment of 50c to this office and cited as his authority Title 51, paragraph 840 (b).

"At the insistence of the License Inspector of this county, Mr. Chambers has paid, under protest, an amount which it is claimed is due for the unused portion of that license issued to Mr. Hedgepath, the payment includes penalty and citation fees.

"Please give me your official opinion as to whether this office should have collected the license on the basis of the law as stated under Title 14, paragraph 240 or is Title 51, paragraph 840 (b) the one that applies in this case."

It is my opinion that your office was correct in following the procedure set out in Code of 1940, Title 14, Section 240.

Title 51, Section 840 (b) deals generally with the transfer of privilege licenses on the sale of a business. The transfer of the license in the case of the sale of a billiard room is, however, specifically dealt with by Title 14, Section 240. It is a well known canon of statutory construction that special provisions relating to specific subjects control general provisions relating to general subjects, and those specifically treated will be considered as exceptions to the general provisions.

Hearing v. Griffin, 211 Ala. 225, 100 So. 202.

City of Birmingham v. So. Express Co., 164 Ala. 529, 51 So. 159.

Downing v. City of Russellville, 241 Ala. 494, 3 So. 2nd 34.

Therefore, the premises considered, it is my opinion that your office correctly issued the new license following the provisions of Title 14, Section 240. See Quarterly Report Attorney General, Volume XXIII, page 16.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 29, 1943.

Hon. I. C. Heck,

State Comptroller,

Capitol.

Act No. 238, H. 495, approved June 22, 1943—Board of Commissioners of State Bar—Travelling Expenses—Code 1940, Title 46, §§ 29-30, 32—

Act No. 238, H. 495, approved June 22, 1943, amending Code 1940, Title 41, § 154, does not apply to expenses incurred by members of the Board of Commissioners of the State Bar payable under Code 1940, Title 46, § 32 out of the fund created by Code 1940, Title 46, §§ 29-30.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of July 24, 1943, is as follows:

"Act No. 238, H. B. No. 495 of the 1943 Legislature, amends Section 154 of Title 41 of the 1940 Code of Alabama.

"This amendment provides the maximum amount allowable to a person traveling in the service of the State of Alabama or any of its agencies, institutions, boards, bureaus, or commissions, for expenses other than actual expenses of traveling, shall be fixed by the Governor at not less than $4.00 nor more than $5.00 per day, such maximum or limit when fixed from time to time to be uniform in operation as to all persons while said persons are traveling within the State.

"The Governor's Proclamation has set an amount of $4.00 per diem as the maximum allowable for traveling within the State of Alabama, effective on and after July 1, 1943.

"Please let us have your official opinion with reference to per diem expenses paid out of funds in the State Treasury to the credit of the Board of Commissioners of the State Bar. Will these per diem expenses be controlled by the above referred to Act and Governor's Proclamation, or should such per diem expenses be paid on the basis of the actual expenditures?"

By Act No. 133, H. 412, approved August 9, 1923 (General Acts 1923, page 100) the Legislature provided for "the organization, regulation and government of the State Bar, including admissions and disbarments of lawyers," according to the title of the Act itself.

For administration of the act a Board of Commissioners was created, and for payment of the expense of administration a "separate fund" was provided, consisting of fees required to be paid by applicants for admission, together with five dollars out of each annual license tax required to be paid by lawyers for the privilege of practicing law. Acts 1923, pp. 100, 105, §§ 10, 11.

The separate fund was "to be disbursed by the State Treasurer on the order of the Board of Commissioners." The Board was expressly authorized "to make orders, concerning the disbursement of said fund." The State Treasurer was expressly authorized to pay money out of the separate fund "upon the order of the Secretary of the Board of Commissioners, countersigned by the President or Vice-President of the Board of Commissioners." Acts 1923, pp. 100, 105, § 13.

Obviously then the Act of 1923 was a self-contained, self-sufficient independent piece of legislation designed to accomplish its avowed purpose, with its own operating fund held in and disbursed from the State Treasury under the control of the Board of Commissioners, whose orders for its disbursement the State Treasurer was required to honor.

These provisions of law now appear, with slight modification, in the Code of 1940 as Title 46, §§ 21-38. Particulars as to creation and disbursement of the separate fund will be found in Sections 29-30 and 32 of said Title 46. Said fund is still composed exclusively of admission fees and part of annual privilege license taxes imposed upon lawyers. Provisions for disbursement of the fund in administration of the statute remain the same as in the original Act of 1923.

Act No. 87, H. 6, approved March 23, 1933 (Gen. Acts, 1933, Extra Session, p. 81) provided that "the maximum amount allowable to persons travelling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation" should be "$3.00 per diem." This act was carried into the Code of 1940 as Section 154 of Title 41, and thereupon twenty-three exceptions were engrafted upon it, applying largely to various State departments and boards, but without reference to the Board of Commissioners of the State Bar.

And it now appears that said Code Section 154 itself has suffered amendment by Act No. 238, H. 495, approved June 22, 1943, striking out the aforementioned twenty-three exceptions to limitation of travelling expenses and imposing a limitation of $4-5, to be fixed by proclamation of the Governor.

It is to be noted, however, that neither the original act of 1933, nor the amended codification thereof of 1940, nor the recent amendment by Act of June 22, 1943, supra, makes reference to the State Bar Commissioners or purports to affect them or their travelling expenses in any way. Whether such commissioners come within the category of "persons travelling in the service of the State of Alabama" or its agencies, institutions, etc., may be open to question or admit of some doubt possibly.

However that may be, in view of the foregoing legislative history, and especially by reason of the fundamental rule of construction that amendment or repeal by implication is not favored, I am of opinion, and so advise, that

said Act of June 22, 1943, as to travelling expenses does not affect or repeal the previously existing law as to payment of expenses of the Board of Commissioners of the State Bar, and does not operate to limit their expenses.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 30, 1943.

Hon. T. C. Almon,

Judge of Probate, Morgan County,

Decatur, Alabama.

Licenses—Drivers License—Date of Issuance.

1. Although drivers license is not due until October 1, 1943, the Probate Judge may receive applications and fees therefor during the month of September 1943.

2. Such fees collected during September 1943 for 1944-45 licensing period must be remitted by the Probate Judge on or before October 10, 1943, remittances to be in a report separate and apart from other collections, designated as collections for the said licensing period.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of July 14, 1943, is as follows:

"Morgan County issued drivers license for the year 1942-43 to slightly more than ten thousand (10,000) persons.

"We will have our supplies for the issuance of drivers' licenses for the period 1944-45 sometime in August. Application is made to the Probate Judge for this license and a temporary receipt issued, the permanent license being mailed from Montgomery. The present license expires on September 30, 1943.

"In your opinion would it be legal if we took applications giving temporary receipts dated the date applied for, during the month of September, reporting the collections for drivers licenses along with the other collections for the month of September, as required by law?"

Your inquiry is answered in the affirmative subject to the modifications herein below set forth.

Those statutory provisions applicable to and imposing the driver's license are found in Title 36, Sections 59-74, Code of 1940. A study of these statutes discloses no specific date upon which the Probate Judge shall begin the acceptance of applications for the license. As evidenced by Title 36, Section 59, Code of 1940, the law merely determines the licensing period to be two years from September 30, 1939, and each two years thereafter, the end of each licensing period being the date of expiration of the licenses issued therefor. Section 59 contains a further provision that the license may be renewed upon application and payment of the fee, but it is silent as to the date when such renewal application may be made.

Inasmuch as the Legislature failed to circumscribe the time during which renewal applications may be made, it is my opinion that the Probate Judge may receive applications for the 1944-45 licensing period during the month of September 1943, and give temporary receipts bearing the date of such application without violating the above statutes. This of course does not affect or shorten the term of the 1942-43 licensing period, the end of which is the date of expiration of licenses issued therefor.

You also request whether the collections made for the 1944-45 licensing period during the month of September 1943 should be reported with other collections made for that month. This inquiry is answered in the negative. Title 36, Section 61, Code of 1940, in that portion which is pertinent to your inquiry, provides in part as follows:

> "§ 61. *** . On the 10th day of every month the judge of probate shall prepare a list showing the number of applications received and permits issued and the amount of fees received during the previous calendar month. One copy of such report shall be forwarded to the director of public safety, one to the comptroller, one to the treasurer, and he shall retain a copy. He shall also at said time deliver to the treasurer the amount of all such fees collected less ten cents for each application received or permit issued, which sum shall be retained by him, and shall be his sole compensation for performing any and all duties required of him under the provisions of this article. All funds remitted to the treasurer under the provisions of this section shall be kept in a separate fund in the treasury to be known as the 'highway patrol fund.'"

Furthermore, Title 36, Section 69, Code 1940, requires that "any unencumbered balance in the highway patrol fund at the end of each two-year licensing period provided for in this article shall be transferred from said fund and covered into the state treasury to the credit of the general fund." Thus the Legislature of Alabama presupposed the use of the proceeds of the drivers' license by the Department of Public Safety and the Highway Patrol during the licensing period for which the license was issued. It can be seen by the above quoted provisions of said Section 69 that when the judge of probate collects the fees from the licenses during the month of September 1943, unless he remits such fees in a separate report designating them as being for the 1944-45 licensing period, they will be transferred to the general fund along with unused collections made for the 1942-43 licensing period, rather than available for use during the period for which they were intended.

Therefore, it is my opinion that you may receive applications and fees for 1944-45 drivers licenses during the month of September 1943 if such fees are reported on October 10, 1943, separate and apart from other monies, and designated as payments for the 1944-45 licenses, which are not actually due until October 1, 1943.

Although answers to the specific questions asked by you were not occasioned therein, there is enclosed herewith an opinion of this office to Hon. James L. Brawner, Acting Director, Department of Public Safety, under date of April 17, 1941 (Quarterly Report of Attorney General, Volume XXIII, page 68) in which similar conclusions were reached.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 30, 1943.

Hon. H. G. Dowling, Commissioner,

State Department of Revenue,

Capitol.

Foreign Corporations—Franchise Tax—

Real Estate Mortgage Loans—

Code 1940, Title 51, §348, §619—

1. Mortgage loans on real estate in Alabama, as to which the mortgage filing tax has been paid for record thereof, held by a foreign corporation doing business in Alabama as a part of its capital assets employed in Alabama should be excluded or deducted therefrom upon computation of the annual franchise tax levied by Code 1940, Title 51, §348, on foreign corporations, whether such loans were made originally in the name or behalf of the corporation or were acquired by it by purchase, transfer and assignment.

2. Such loans as to which the mortgage filing tax has not been paid, because of exemption of the mortgagee as a federal agency or instrumentality, upon sale, transfer or assignment to a non-exempt foreign corporation, become a part of the latter's capital assets subject as such to consideration for purposes of the franchise tax imposed by Code 1940, Title 51, §348.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of June 21, 1943, has been received and reads as follows:

"In the administration of the franchise tax on foreign corporations certain questions have arisen as to what mortgages or mortgage loans are properly deductible from the amount of capital employed by a foreign corporation in Alabama, in computing the franchise tax, and your official opinion, therefore, is respectfully requested, as follows:

"1. Whether or not mortgages on lands in Alabama, upon which the recording privilege tax has been paid, which mortgages were not executed to the corporation but were thereafter purchased by it, are entitled to be deducted from the amount of capital employed by the corporation in this State, in determining the amount of the franchise tax?

"2. Whether or not mortgages on lands in Alabama, upon which no recording privilege tax was paid for the reason that the mortgages were executed to an instrumentality of the United States, and which were thereafter purchased by the corporation, are entitled to be deducted from the amount of capital employed by the corporation in this State, in determining the amount of the franchise tax?"

Code 1940, Title 51, Section 348, reads, in part, as follows:

" *** In ascertaining the annual franchise tax which will be paid by any foreign corporation doing business in this state under this section there shall be **deducted** from the amount of the capital employed in such corporation in this state the **aggregate amount of loans of money made by such corporation in this State and which shall be secured by existing mortgage or mortgages to it on real estate in this state and upon which mortgage or mortgages there shall have been paid the recording privilege tax provided by law.** *** "

This provision of law as to the annual franchise tax upon foreign corporations doing business in the State has been carried forward without change from time to time as far back as the Revenue Act of 1919 (General Acts 1919, page 291, Section 16.)

The obvious intent was and continues to be to encourage foreign corporations to invest their funds in mortgages in Alabama real estate by holding out to them as an inducement thereto this exemption of funds so invested from the franchise tax.

The answer to your first question turns upon the interpretation to be given to the words "loans of money made by such corporation *** secured by existing mortgage or mortgages to it *** ." In a strictly literal sense these words may be interpreted to apply only to mortgage loans secured by mortgage in which the foreign corporation is mortgagee. They would also extend beyond all question, however, to mortgage loans made by some agent of the corporation in the name of the agent as mortgagee. Qui facit per alium facit per se.

Under a liberal rule of construction the quoted words might be held to include possibly all mortgage loans held by the corporation whether the loan was originally made in its name or in the name of its agent or was acquired by it by purchase. In either event the object and purpose of the statute would be subserved by inducement of the corporation to invest its assets and funds in Alabama real estate mortgages.

To even a casual student of statutory enactments it is a mere truism that legislatures do not always express their intents and purposes in strictly accurate language.

In **Crook v. Commissioners Court of Calhoun County,** 145 Ala. 505, 507, 39 So. 383, it was said:

> "The natural import of words is their literal sense, but this may be varied to give effect to the fundamental purpose of a statute. And the mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute."

It is apparent from Section 348, Title 51, supra, that the **fundamental purpose** of the deduction of mortgage loans from a foreign corporation's assets in calculating the annual franchise tax was to encourage such corporations to devote their capital, in part at least, employed in this state to Alabama real estate mortgages.

The words "loans of money made by such corporation *** secured by existing mortgage or mortgages to it" are broad enough, in my opinion, to include mortgage loans held by such corporations although not originally made to them as mortgagee or to their agents as mortgagee.

These words are not words of art, and their meaning should be deduced from the connection in which they are used and the obvious intent of the statute.

If these words are of doubtful import we may resort to the well-known principle of construction that revenue measures of doubtful import should be construed most favorably to the taxpayer. 59 **C. J.** 1131-1135; **State v. Seale Piano Co.,** 209 Ala. 93, 95 So. 451; **State v. Roden Coal Co.,** 197 Ala. 407, 73 So. 5.

Answer to your second inquiry is afforded by the statute itself which excludes from the amount of capital assets employed in this state only such real estate mortgage loans as to which there has been paid "the recording privilege tax provided by law." Code 1940, Title 51, §348. Whatever the basis for non-payment of such tax may be, it would seem immaterial to inquire. Once the loan has passed from its original tax-exempt holder or maker into the hands of a non-exempt holder it becomes subject to the franchise tax imposed on foreign corporations generally because the mortgage filing tax thereon has not been paid. And when the filing tax has been paid, the amount of the loan is then deductible.

The situation is analogous to that involved where a national bank as-

signs or transfers a mortgage made to it, as to which it was exempt from payment of the filing tax. Record of the transfer or assignment, however, is subject to the deed filing tax because the new holder, assignee or transferee of the mortgage has no personal basis of exemption. Biennial Report, Attorney General, 1936-38, p. 729; Quarterly Report, Attorney General, Vol. XXVII, p. 104.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 2, 1943

Hon. T. C. Almon,

Judge of Probate,

Decatur, Alabama.

Licenses—Date of Issuance—Title 51, Sections 710, 712, 847 and 851, Code of 1940—Judge of Probate—

1. Judge of Probate may receive applications for privilege licenses during month of September even though such licenses are not due until October first.

2. In such case the Probate Judge should date each license as of the date of its issuance, and fees collected therefor should be remitted and reported separate and apart from collections of fees for current licenses.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of July 14, 1943, is as follows:

"Privilege license in Alabama for 1942-1943 expire on September 30, 1943.

"As a rule, around the first of October, we are at our busiest period in the year, issuing licenses and automobile license plates. In the face of the license, it states the year for which it is issued and the date it expires.

"In your opinion would it be legal if we issued privilege licenses in

September, dating the license the day it was issued, reporting the collections for privilege licenses along with other collections for the month of September, as required by law."

In answer to your inquiry it is my opinion that you may issue privilege licenses for the period beginning October 1 during the month of September and date such licenses as of the date of issuance.

The Legislature of Alabama has established no prescribed period during which applications for privilege licenses may be received; rather, it has seen fit to provide only the dates on which such licenses shall become due and delinquent, as evidenced by Title 51, Section 851, Code of 1940, which statute provides as follows:

"§ 851. Due and delinquent date of licenses.—Except as otherwise provided, all licenses or privilege licenses payable hereunder shall be due on October first of each year and shall be for one year ending September thirtieth following, and shall be delinquent on the first day of November of each year."

In the absence of any statute evidencing a legislative intent to circumscribe the period during which privilege licenses may be issued, it is my opinion that the acceptance of applications therefor by the Judge of Probate during the month of September will be valid, even though such licenses are not actually due until October first.

Insofar as automobile licenses are concerned, during the recent session of the Legislature there was enacted a statute (House Bill No. 507, General Acts of Alabama 1943) establishing the first day of October as the due date and the sixteenth day of November as the delinquency date applications for motor vehicle licenses. This statute repealed that part of Title 51, Section 710, Code of 1940, which permitted the issuance of such licenses only during the period of forty-five days prior to the fifteenth day of November. Therefore, the reasoning hereinabove applied to other privilege licenses is now applicable to motor vehicle licenses, i. e., their issuance during the month of September does not come within any statutory inhibition.

In regard to the manner of remitting the fees collected for privilege licenses issued during the month of September, it is my opinion that such collections should be remitted to the State Treasurer in a report separate and apart from the remittance of other monies. Title 51, Section 847, Code of 1940, insofar as it is pertinent to your inquiry, provides in part as follows:

"§ 847. Disposition of moneys by judge of probate.—Within ten days after the end of each month, the judge of probate must remit to the state treasurer at the expense of the state, all money received by him for licenses belonging to the state, and pay to the county treasurer all the money received by him for licenses belonging to the county, and within the same time the judge of probate shall forward to the comptroller and to the department of revenue each certified list of all licenses issued by him, stating thereon for what business issued, amount collected for each license, from whom collected, and the date of such collection; and if no licenses have been issued, he shall report that fact. *** ."

Title 51, Section 712, Code of 1940, prescribes a similar manner for the remittance of fees received for motor vehicle licenses.

By virtue of these statutes there devolves upon the Judge of Probate a duty to furnish complete and accurate information of the issuance of privilege licenses. In conformity therewith those fees for privilege licenses collected during the month of September must be remitted and reported within the first ten days of October. Moreover, in order to effect the manifest purpose of these statutes, it is my opinion that fees for those privilege licenses issued during the month of September for the licensing period beginning the first of October should be remitted and reported separate and apart from the collection of fees for other privilege licenses during the month of September. Only by the use of this system will the records of the State Treasurer, Comptroller and other recipients of such reports, accurately reflect the accounts for each fiscal year and other information required by law.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 3, 1943.

Hon. Hayse Tucker, Director,

Department of Finance,

Capitol.

State Insurance Fund—County Superintendent of Education—Title 28, Section 317, Code of Alabama 1940.

County Superintendent of Education is not authorized to insure with the State Insurance Funds school buildings and equipment where said buildings were erected and equipped wholly with county funds without the aid of appropriations from the State.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of July 27, 1943, is as follows:

"Section 317, Title 28, Code of Alabama of 1940 reads as follows:

" 'There shall be a fund to be known as the state insurance fund to be carried by the treasurer for the purpose of insuring against loss by fire or tornado all state owned buildings, or buildings in which the

state has appropriated moneys for erection or equipment thereof, or property which may have been deeded to the state, and all property, equipment, furniture, fixtures or supplies belonging to or stored in said buildings, and any and all properties of such nature as hereafter may be acquired by the state. (1923, p. 769).'

"(1). Does this section give the County Superintendent of Education authority to insure school buildings and equipment with the State Insurance Fund, where the title to said school building and equipment is vested in the County Board of Education and they were constructed and equipped in whole with County Funds and without the aid of appropriations from the State?"

Your inquiry presents two questions which I will consider separately.

(1) Whether or not the County Superintendent of Education has authority to insure school buildings with the State Insurance Fund where the title to said buildings is vested in the County Board of Education, and such buildings were constructed and equipped in whole with county funds and without the aid of appropriations from the State.

(2) Whether or not the County Superintendent of Education has authority to insure school equipment with the State Insurance Fund, the title to which equipment is vested in the County Board of Education, and which was purchased wholly with county funds without the aid of appropriations from the State, when it is stored in the buildings referred to above.

It is my opinion that the first question presented by your inquiry must be answered in the negative.

Section 317, supra, provides for insurance with the State Insurance Fund the following buildings: (1) All State owned buildings, (2) buildings in which the State has appropriated money for erection or equipment, and (3) buildings which have been deeded to the State.

The school buildings referred to in your request do not come within any one of the three classifications listed above. Therefore, it follows, that the County Superintendent of Education does not have authority to insure such buildings with the State Insurance Fund.

It is also my opinion that the second question presented by your inquiry must be answered in the negative.

Under the provisions of Section 317, supra, "all property, equipment, furniture, fixtures or supplies belonging to or stored in said buildings," are to be insured with the State Insurance Fund. The words "in said buildings" refer to buildings which fall in one of the three classifications enumerated above. The equipment referred to in your request does not belong to nor is it stored in buildings which come within any of said classifications. It follows the County Superintendent of Education does not have authority to insure

such equipment with the State Insurance Fund.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 4, 1943.

Hon. Reo Kirkland,

Clerk of the Circuit Court,

Escambia County,

Brewton, Alabama.

Costs and Fees—Fine and Forfeiture Fund—Circuit Clerks—Sheriffs—

1. Circuit Clerks cannot collect a fee in criminal cases for issuing subpoenas for defendant's witnesses from the Fine and Forfeiture Fund.

2. Sheriffs cannot collect a fee in criminal cases for serving subpoenas on defendant's witnesses from the Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

Your request for an official opinion bearing date of July 27, 1943, is as follows:

"Subsection 'B' of Section 83, Title 11 Code of 1940 reads as follows: 'In all trials in the Circuit Court, or County Court, or court of like jurisdiction—except Justice of the Peace Court and courts in lieu of Justice of Peace Courts whose jurisdiction in criminal cases is limited to the jurisdiction of Justice of Peace Courts, where the state fails to convict, or the indictment abates or is nolle prossed or withdrawn and filed, the fees of the sheriffs and clerks of the court and the state's witnesses shall be paid out of the fine and forfeiture fund, but the sheriffs and clerks must make affidavit before the judge of the court in which the case is tried of the amount due them.'

"Please advise me if, under the above quoted section, I, as clerk of the Circuit Court, and ex officio Clerk of the County Court, am entitled to collect my fees for issuing subpoenas for defendant witnesses from the fine and forfeiture fund.

"If your answer to the above is in the affirmative then the sheriff will likewise be entitled to his fee for serving said subpoenas, will he not?"

In my opinion both of your inquiries must be answered in the negative.

I am sure you are familiar with the fact that the law on costs and fees in criminal cases is penal in nature and must be strictly construed. No officer is entitled to a fee unless his right thereto is clearly fixed by law. Title 11, Section 79, **Code of 1940; Quarterly Report of Attorney General,** Volume XXIX, page 24.

Even though this is true I find that circuit clerks are allowed a fee of twenty-five cents for each subpoena issued by them in criminal cases and that sheriffs are allowed a fee of fifty cents for serving them. Sections 89 and 100, Title 11, **Code of 1940.** These sections clearly fix your right to a fee for such services. The question propounded by you is: Can such fees when the service therefor has been rendered at the request and for the benefit of a defendant in a criminal case become a charge against the Fine and Forfeiture Fund of a county?

Our Supreme Court has definitely answered this question, and in so doing held that fees for such services when rendered for the defendant must be paid for by him. **Cohen v. Coleman,** 71 Ala. 496; **Bowen v. State,** 98 Ala. 83, 12 So. 803; **Burgin v. Hawkins, Treasurer,** 101 Ala. 326, 14 So. 771.

The Supreme Court in the case of the **State ex rel v. Coleman,** 73 Ala. 550, defined the Fine and Forfeiture Fund of the county as, "a fund accruing from pecuniary penalties and punitive impositions incurred by defendants in the enforcement of criminal prosecutions, in the nature of profits arising from our system of criminal procedure." The Court further pointed out that the Fine and Forfeiture Fund is to be used in paying the expenses occurring and recurring by the State in cirminal cases and not for those expenses incurred in such cases by defendants.

By reason of what the Supreme Court has said in the above-cited cases I am of opinion that circuit clerks and sheriffs are not entitled to collect their fees for issuing and serving subpoenas on defendant's witnesses from the Fine and Forfeiture Fund. I also might add that there has been no substantial change in the law on costs and fees since the above decisions were handed down by our Supreme Court.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 6, 1943.

Hon. James R. Swedenburg,

Superintendent,

Pickens County Board of Education,

Carrollton, Alabama.

Office of Profit—holding office as member of county board of education and justice of the peace prohibited. Title 41, Section 5(7).

Office of Profit—holding office as member of county board of education and acting postmaster prohibited. Constitution, Section 280.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 13, 1943, is as follows:

"Questions of eligibility of several members of the County Board of Education having arisen, I am writing you for your opinion on the questions and, in order that each may be understood by you, I am stating each of them separately as follows:

"1. One member of the County Board of Education was elected and qualified as such in the year 1940 and is now acting and has acted since his qualification as such member of the Board. In January, 1943, he was appointed Justice of the Peace for Beat Number 14 of Pickens County, Alabama, gave bond and qualified and is now acting as such Justice of the Peace. Under the provisions of Section 280 of the Constitution, he takes the position that he is not holding two offices profit under the state, but, please examine the opinion of the Attorney General as found in Opinions of Attorney General for 1926-1928 and Opinions of Attorney General 1934-35 at page 240 and clarify the question for me. If it is illegal for him to hold both offices, advise me if, by qualifying as Justice of the Peace, he vacated the office of Member of the Board of Education of the County.

"2. One member of the Board of Education has held office for several years but, within the last twelve months, the postmaster of his town was called into service of the armed forces and this member of the county board of education was appointed Acting Postmaster to serve until the postmaster in service returns. The salary of the Acting Postmaster is in excess of two hundred dollars a year. Please advise if this member of the board is holding two offices of profit and, if so, what is the effect of his accepting and holding the office of the Acting Postmaster.

"3. One member of our County Board of Education is an alderman

of an incorporated town and is paid a per diem for each day that he attends meetings of the town council. Does this fact render him ineligible to hold the office of Member of the County Board of Education."

1. You are advised that the office of member of the County Board of Education and the office of justice of the peace are both civil offices of profit under this state. **Biennial Reports of the Attorney General, 1926-28, page 461.**

Although holding both of these offices is not prohibited by Section 280 of the Constitution of 1901 since justices of the peace are expressly excepted, the holding of both of these offices at the same time is prohibited by Title 41, Section 5(7) of the Code of Alabama of 1940. **Biennial Reports of the Attorney General, 1926-28, page 461.**

Being a member of the County Board of Education and then accepting an appointment to the office of Justice of the Peace and entering upon the duties of the latter office vacates the former office. **State ex rel Camp v. Herzberg,** 224 Ala. 636; 141 So. 553, citing **Shepard v. Sartain,** 185 Ala. 439, 64 So. 504; see also 100 A. L. R. 1170.

2. You are also advised that when a member of the County Board of Education accepts an appointment as acting postmaster, the annual salary exceeding $200, and enters upon the duties of postmaster he thereby vacates the office of member of the County Board of Education. Constitution of 1901, Section 280, Title 41, Section 5(7). The fact that the federal office is known as "acting postmaster" means that the term is uncertain and extends only during the absence of the regular postmaster on military service or until it has been determined that the regular postmaster will not return. 39 U. S. C. A. 39a. See **Shepard v. Sartain,** 185 Ala. 450, 67 So. 57. It is not necessary that an office have a fixed term to make the person holding that office an officer within the meaning of Section 280 of the Constitution. **Biennial Reports of the Attorney General,** 1926-1928, page 105, 107. In my opinion so far as Section 280 of the Constitution is concerned an acting postmaster is in the same position as a regular postmaster.

3. I have not answered your third inquiry due to the fact that I have been advised by your attorney that this question, as framed, does not present the true situation. It now appears that the member of your county board of education who is also an alderman of an incorporated town receives no compensation whatsoever for the services performed by him as alderman. If this is a true statement of the situation, upon receipt of a letter from you setting forth that the member of the board, who is also an alderman, receives no per diem or other compensation, I will be delighted to give you my opinion as to whether or not he is disqualified, by virtue of the fact that he is an alderman, from serving on your board of education.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 10, 1943.

Hon. C. W. Marsh,
Treasurer of Choctaw County,
Butler, Alabama.

1. Fine and Forfeiture Fund—No vested rights therein.

2. Fine and Forfeiture Fund—Choctaw County—Disposition of funds on hand at passage of Local Act (1943 No. 170, H. 436—Porter).

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 15, 1943, is as follows:

"Since receiving your letter of June 23, 1943 which was in reply to mine of June 18, 1943, asking for an opinion on the pending bill to regulate the Fine and Forfeiture Fund of Choctaw County, I understand the Governor signed the bill and I would like very much to have your opinion, as to whether or not it would destroy any vested rights, and also as to how I shall now use the accumulated funds in Fine & Forfeiture Fund that were on hand with me when the bill was made a law."

You ask two questions:

1. Whether the local act regulating the fine and forfeiture fund of Choctaw County, Alabama, Local Acts, No. 170, H. 436—Porter, approved June 17, 1943, destroys any vested rights?

2. How you shall now use the accumulated funds that were on hand when the bill became law? (June 17, 1943).

You are advised that the recent local act destroys no vested rights since there are no vested rights connected with the fine and forfeiture fund. Our Supreme Court has stated:

"Nobody has, or can have, a vested right to share in or be paid out of the (fine and forfeiture) fund, since the right so to do, when it is accorded by the legislature, is a matter of mere grace and expediency. And all services performed by officers or witnesses, at a time when compensation therefor may be paid out of the fund in the event it is not collected from defendants, in causes in which the services are rendered, must be held to have been performed in recognition of the General Assembly's plenary power to so change existing statutory provisions as to withdraw the fund from application to such claims altogether, or to provide a different mode for such application, and make the right to share therein depend upon other conditions which might involve a pro rata distribution in lieu of payment in full in the order in which claims are registered." **Harold v. Harrington,** 95 Ala. 395, 396, 11 So. 131; **Shell v.**

Beeland, 123 Ala. 569, 26 So. 342.

In answer to your second inquiry:

After reading the Local Act in question it is my opinion that the money in the fine and forfeiture fund at the time this local act became effective together with the additional amounts that shall be added to the fund after the effective date of the Local Act should be used as follows:

1. To pay claims against the fine and forfeiture fund issued on or after June 17, 1943 and registered (in the order of registration).

2. To pay, after September 30, 1943, claims against the fine and forfeiture fund issued before June 17, 1943 and re-registered within 90 days after June 17, 1943 (in the same order as that of the prior registration) provided, that this fund has a surplus available for paying these claims after deducting the amount of unpaid registered claims issued since June 17, 1943 from the balance in the fine and forfeiture fund on September 30, 1943.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 11, 1943.

Hon. Will O. Walton,

Senator, Ninth Senatorial District,

LaFayette, Alabama.

Merit System—Retirement System Commission—Traveling Expenses—General Acts of Alabama 1943, Act No. 190—General Acts of Alabama 1943, Act No. 238.

Under General Acts of Alabama 1943, Act No. 190, members of the Retirement System Commission are entitled to expenses for transportation, board, lodging, etc., out of the funds appropriated by said act, incurred by them in carrying out the purpose of said act, subject, however, to the limitation provided in General Acts of Alabama 1943, Act No. 238.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for official opinion bearing date of July 27, 1943, is as

follows:

"The recent Legislature passed House Bill No. 389 by Mr. Sessions of Jefferson, a copy of this bill being attached hereto and made a part of this letter. I shall thank you to give me an official opinion on the following relating to said bill;

"1. Can the Commission created under this bill lawfully spend any of the funds appropriated by said bill, to-wit, $4500.00 in paying the expenses incurred by the members of the Commission in carrying out the purposes of the Act."

The act to which reference is made in your request is Act No. 190, General Acts of Alabama 1943, and reads as follows:

"To provide for a commission to be appointed from the Legislature for the purpose of having made an actuarial study, and having prepared a retirement plan for State employees, and to appropriate the sum of forty-five hundred dollars to pay the cost thereof.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That there be appointed a Commission to be known as the Retirement System Commission, consisting of five members, three to be appointed by the Speaker of the House of Representatives from the members of the House, and two to be appointed by the President of the Senate from the members of the Senate.

"Section 2. That the Retirement System Commission be and is hereby authorized to employ a competent actuarial agency to make a complete actuarial survey and to prepare an actuarially sound retirement plan for State employees, said plan to be presented for consideration of the Legislature in regular session in 1945. Provided further that the actuarial survey made in compliance with the provisions of this act shall determine the possibility of any retirement system recommended as a result of the survey being extended on an optional basis to employees of the several county, town and city governments of the State.

"Section 3. That there be and is hereby appropriated from the General Fund of the State the sum of forty-five hundred dollars, or as much thereof as is necessary to pay the cost of carrying out the purposes of this act.

"Section 4. That this Act shall be effective upon its passage and approval by the Governor.

"Approved June 18, 1943."

I assume that by "expenses" you mean the expenses of the members of the commission for transportation, board, lodging, etc. The above act is entirely silent as to whether the members of the Retirement System Commission may spend any of the funds appropriated by said act in paying expenses

incurred by them in carrying out the purposes of said act.

It is a rule of statutory construction that the courts in construing a statute will give it the construction which will effectuate the purpose of the Legislature in passing it. **Cole v. Gullat,** 241 Ala. 669, 4 So. 2d. 412.

There can be little doubt that the members of this commission reside in different sections of the State and that it is necessary that they travel to some given point as a meeting place to confer jointly on the plans and procedure necessary to carry out the purpose of this act. The scope of this work is such that joint meetings will be imperative. Board, lodging and traveling expenses will be incurred by each member of the commission when they are in attendance at such meetings.

It is my opinion that the Legislature intended that the members of said commission should be paid their expenses in carrying out the purposes of this act from the funds so appropriated.

However, I deem it advisable to call your attention to Act No. 238, General Acts of Alabama 1943, which act fixes the maximum amount allowed to persons travelling in the service of the State, its commissions, etc., for expenses other than actual expenses of transportation. This act is as follows:

"An Act

"To amend Section 154, of Title 41, of the 1940 Code of Alabama.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That Section 154, of Title 41, of the Code of Alabama be and the same is hereby amended to read as follows: Section 154. The maximum amount allowable to a person traveling in the service of the State of Alabama or any of its agencies, institutions, boards, bureaus or commissions for expenses other than actual expenses of traveling shall be fixed by the Governor at not less than four dollars per day not more than five dollars per day, such maximum or limit when fixed from time to time to be uniform in operation as to all persons while said persons are traveling within the State. Persons traveling in the service of the State or any of its agencies, institutions, boards, bureaus or commissions outside the State of Alabama shall be allowed all their actual and necessary expenses, in addition to their actual expenses for transportation, provided such travel shall have first been duly authorized in writing by the Governor; provided further, that persons traveling on official business for the State or any of its agencies, institutions, boards, bureaus or commissions in privately owned vehicles shall receive five cents per mile in lieu of their actual expenses for transportation.

"Section 2. That all laws or parts of laws in conflict with the provisions of this Act are hereby modified so as to conform with the provisions hereof.

"Section 3. This Act shall take effect immediately upon its passage

and approval by the Governor or its otherwise becoming a law.

"Approved June 22, 1943."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 11, 1943.

Mrs. Edwina Mitchell,

Associate Member,

Board of Pardons and Paroles,

Montgomery 5, Alabama.

Pardon, parole and probation—Prisons and prisoners—Sentence—Deductions—General Acts 1943, Act No. 534.

Prisoner not entitled to good conduct deduction from sentence for time spent on parole.

Opinion by Assistant Attorney General Vardaman.

Dear Mrs. Mitchell:

Your request for an official opinion bearing date of August 2, 1943, is as follows:

"Please refer to a recent act of the Legislature (S. 353) providing for deductions from sentences for good conduct and advise us on the following questions:

"(1) Will a parolee be entitled to the benefits of the provision?

"(2) If the answer to question 1 is in the affirmative, is the act retroactive as to those paroled prior to the enactment of the law?

"Under the decision in the case of Pinkerton vs State (198 So. 157), the parolee is serving his sentence while on parole and is entitled to discharge at the expiration of his sentence just as if he had completed it inside prison walls.

"Code of 1940, Title 42, Section 7 provides that a paroled prisoner shall remain on parole 'until the expiration of the maximum term speci-

fied in his sentence or until he is fully pardoned ***' Does the provision of the act approved July 9, 1943, (S. 353) supersede and amend the provision of Code Title 42, Section 7, in fixing the length of sentence of a parolee whose conduct both in prison and on parole has been good?

"Inasmuch as it will be necessary for us to go through all of our files and discharge parolees if you give us an affirmative answer, we shall appreciate an immediate reply."

Act No. 534, S. 353, approved July 9, 1943, provides, in pertinent part, as follows:

"Each prisoner who has been or shall hereafter be convicted of any offense against the laws of the State of Alabama, and is confined, in execution of the judgment or sentence upon any such conviction, in the penitentiary, or at hard labor for the county, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of the execution of the sentence: *** "

Good conduct statutes have as their purpose the improvement of prison discipline and they reward prisoners who conform to the rules and regulations of the prison authorities. The Supreme Court of Alabama in passing upon an earlier good conduct statute stated:

" 'Good conduct statutes are framed with the intention of improving prison discipline, and have that effect, if their enforcement is allowed. The credits are said to be in the nature of a payment or reward by the state to the convict for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes and misdemeanors during his imprisonment. Such statutes are prompted by the highest motives of humanity, and are looked on with favor both by state and Federal Legislatures.' 21 R. C. L. 1192, § 26.

"The first statute of this character in this state (Clay's Digest, p 406, § 67), enacted in 1843, declared that it was 'for the encouragement of the convicts to conduct themselves with industry and propriety.' In construing these statutes this purpose should, of course, have appropriate consideration." **State Board of Administration v. Jones,** 212 Ala. 380, 102 So. 626.

If the time spent by a prisoner on parole did not count on his sentence then there could be no question but that such a parolee would not be entitled to a deduction for good conduct during such period. The language of our statute is clear that the prisoner must be "confined *** in the penitentiary or at hard labor for the county." The question that presents itself is whether a prisoner paroled as provided by Code of 1940, Title 42, Chapter I, whose sentence is credited with the time that he spends on parole is, within the meaning of Act No. 534, supra, "confined *** in the penitentiary"?

In case of **Woodward v. Murdock,** (Ind.) 24 N. E. 1047, the Supreme Court of Indiana, in an opinion which also held that a prisoner on parole should be given credit on his sentence for the time spent on parole stated:

> "It is very clear, we think, that the appellant could not earn good time while away from the prison. The right to credit for good time is purely a statutory right, and can only be acquired in the manner and under the circumstances pointed out by the statute. The language of the statute is, 'that every convict who is now in or who may hereafter be confined in the penitentiaries of the state of Indiana, *** and who shall have no infractions of the rules or regulations of the prisons or laws of the state recorded against him, and who performs in a faithful manner the duties assigned to him,' etc. It is only necessary to say that the language of the statute forbids its application to a prisoner when out of prison on parole. A prisoner cannot be out of prison and at the same time confined in prison; and when out of prison he can have no infractions of the rules and regulations of the prison recorded against him, nor can duties be assigned to him as a prisoner."

The situation presented to the Indiana Court is identical, in legal aspect, to the question here presented. The opinion of that court is, I think, a sound and logical one. The case of **Pinkerton v. State,** 29 Ala. App. 472, 198 So. 157, Cert. den. 240 Ala. 123, 198 So. 162, undisputably holds that a prisoner on parole is serving his sentence, but I do not believe the opinion could be construed to mean that such a prisoner was actually confined in the penitentiary while he is on parole. In fact the opinion uses the expression "upon parole outside of prison walls."

In view of the purpose for which the act was passed and the case of **Woodward v. Murdock,** supra, it is my opinion that your inquiry numbered one must be answered in the negative. Other than numerous Federal decisions which are based upon the Federal statute, which specifically provides for the granting of deductions for good conduct while on parole, my research reveals only one case, **Crooks v. Sanders,** (S. C.) 115 S. E. 760, 28 A. L. R. 940, holding to the contrary. This case is, in my opinion, unsound.

In view of my answer to your first question, it is not necessary to answer your second one.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 12, 1943.

Hon. B. G. Farmer,

Sheriff, Houston County,

Dothan, Alabama.

Justice of the Peace—Costs and Fees—Sheriff's Guard Fee—Houston County—

1. Local Act No. 434, S. 381, approved July 6, 1943, is invalid and unconstitutional.

2. A sheriff is entitled to a guard fee for committing a prisoner to jail when such prisoner has been sentenced to jail for failure to pay his fine.

3. Such guard fee cannot be collected by the Sheriff of Houston County from the county fine and forfeiture fund when such commitment was made by the Court of Common Pleas of Dothan.

4. Such guard fee cannot be collected by the Sheriff of Houston County from the Inferior Court Fund when the commitment was made by the Court of Common Pleas of Dothan.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1943, is as follows:

"I would like to have your opinion on the following proposition:

"If a defendant is convicted in the Court of Common Pleas of Dothan, Alabama, which court exercises the same jurisdiction as justice of the peace courts, and is unable to pay the fine and costs and, upon failure to pay the fine and costs, is sentenced to a term in jail to pay the fine, am I entitled to a guard fee or turn key fee for committing him to jail to serve this sentence?

"If the answer is in the affirmative, should this fee be paid out of the fine and forfeiture fund of the county or should it be paid out of the Inferior Court Fund?

"If you hold that I am entitled to this fee, is it necessary that the Clerk of the Court of Common Pleas issue execution against the defendant for the cost in the case and that said execution be returned 'no property found' before said fee can be paid out of the proper fund? It is my understanding that a defendant in a case of this character cannot be sentenced for any part of the cost and therefore the issuance and return

of an execution would not be necessary. However, I would like your opinion as to this.

"If the issuance of an execution is necessary, is it the duty of the Clerk of the Court of Common Pleas to issue the same?"

In my search for answers to your inquiries, I discovered that the recent session of the Legislature passed a local act (Local Act No. 434-S381, approved July 7, 1943,) permitting the payment of certain fees of the Sheriff of Houston County for services in the Court of Common Pleas of Dothan from the Inferior Court Fund of said county. You did not mention this in your inquiry, however, I am sure you had it in mind since the apparent purpose of said local act was to authorize such payments from said fund. At any rate I find it necessary to consider said local act in connection with your inquiry.

Said local act is short and here set out in full for your convenience:

"AN ACT

"To amend an Act known as House Bill No. 992, passed by the Legislature of Alabama and approved September 27, 1923, establishing an inferior court in precinct 3, Houston County, Alabama, in lieu of all justices of the peace and notaries public with powers of justice of the peace in said precinct to be known as Court of Common Pleas of Dothan, Alabama; and providing that all process issued out of said court shall be served by the Sheriff of Houston County, Alabama, by adding thereto Section XVI.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That Section XVI of an Act known as House Bill No. 992 passed by the Legislature of Alabama and approved September 27, 1923, be amended to read as follows: 'Section XVI. In all criminal cases in said court where the case is nol prossed, or where the defendant is discharged, or where the defendant is sentenced to jail and does not pay the costs, the Sheriff of Houston County, Alabama, shall be entitled to receive the same fees due to him in like cases in the Circuit Court for arrests, jail fees, approving bonds and serving subpoenas; and said fees shall be paid to him out of the Inferior Court Fund of Houston County, Alabama, on a warrant to be drawn by the Judge of Probate of Houston County, Alabama, on said fund on proper proof by the Sheriff that he has performed such services. It shall be considered proper proof when the Sheriff submits to the Judge of Probate an itemized sworn statment of such fees.'

"Approved July 6, 1943."

A casual reading of the above act reveals the fact that, according to its title, the purpose of the same is to amend local act No. 410, Local Acts of 1923, page 288, approved July 27, 1923, creating the Court of Common Pleas of Dothan, Alabama, **by adding thereto Section XVI.**

A further reading of the above local act reveals the fact that, according to Section 1 thereof, the purpose of the same is **to amend Section XVI of the original act,** creating the Court of Common Pleas of Dothan, Alabama.

By referring to the original act, creating the Court of Common Pleas, it is found that said act contains Sections 1 to 15 only. It does not contain Section 16. Therefore, it appears that the recent local act, under consideration, attempts by the title to amend the original act **by adding a new section thereto,** and then, at the same time, attempts in the body of the act **to amend a section of the original act which never existed.**

In view of the above facts and in line with the holding of the authorities listed below, it is my opinion that said local act No. 434, approved July 7, 1943, is offensive to the provisions of Section 45 of the Constitution of 1901, and is, therefore, unconstitutional and invalid. **Rogers et al. v. Torbut,** 58 Ala. 523, **Stewart v. Court of County Commissioners of Hale County,** 82 Ala. 209, 2 So. 270; **Judson v. City of Bessemer,** 87 Ala. 240, 6 So. 267; **Miller, Judge v. Berry,** 101 Ala. 531, 14 So. 655; **In Re: Opinion of the Justices,** 237 Ala. 377, 186 So. 731.

Since reaching the above conclusion about the recently enacted local act, I shall proceed to answer your inquiries without giving any consideration to it.

In my opinion your first inquiry should be answered in the affirmative. This office has held on many occasions that a sheriff is entitled to a guard fee each time a person is lawfully committed to jail under facts similar to those outlined in your inquiry. Title 11, Section 100, **Code of 1940; Quarterly Report of the Attorney General,** Vol. XVIII, pages 84 and 86.

In my opinion your second inquiry should be answered in the negative. The local act, supra, creating the Court of Common Pleas of Dothan, confers upon it the same jurisdiction and powers as those conferred upon justice of the peace courts. In fact, the Court of Common Pleas of Dothan is a J. P. Court and was created in lieu of justice of the peace courts in precinct three of Houston County. This office has heretofore held that costs accruing in a justice of the peace court cannot be collected from the fine and forfeiture fund of a county. For the same reasons such costs accruing in the Common Pleas Court of Dothan cannot be paid from such fund. **Opinions of the Attorney General, Biennial Report 1926-28,** page 702, and **Quarterly Report of the Attorney General, Vol. XIV,** page 66.

Likewise, your guard fee cannot be collected from the Inferior Court Fund of the Common Pleas Court, and you were so advised in an opinion of this office, dated October 15, 1942, and reported in Quarterly Report of the Attorney General, Volume XXIX, page 24.

In view of the opinion herein expressed in answer to your inquiries numbered 1 and 2, I see no reason for answering parts numbered 3 and 4.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 12, 1943

Hon. William W. Hill,

Judge of Probate,

Montgomery County,

Montgomery, Alabama.

Code of 1940, Title 51, §§ 304, 312—Tax Sales—Redemption—Act No. 578, H. 545, approved July 12, 1943—Act No. 579, H. 547, approved July 10, 1943—Constitution, 1901, § 45—

Act No. 578, H. 545, approved July 12, 1943 amending Code 1940, Title 51, § 304, and Act No. 579, H. 547, approved July 10, 1943, amending Title 51, § 312, held unconstitutional.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1943, is as follows:

"We have just received a copy of an act passed by the Legislature to amend Section 304 of Title 51, Code of Alabama of 1940 in reference to redemption of lands sold for taxes. Section (f) reads as follows: 'If the lands sought to be redeemed, or any portion thereof, are situated in any municipality, the redemptioner shall also deposit with the Probate Judge the amount of any unpaid taxes assessed against the same by such municipality, and an amount equal to any municipal taxes thereon which, subsequent to the tax sale, were not assessed by reason of the fact that such land had been purchased by the State of Alabama, plus interests which would have accrued upon such municipal taxes from the time the same would have otherwise become delinquent, which amounts, with interest, shall be treated and distributed in the same manner as taxes and interest thereon.'

"We understand by this the Judge of Probate is to collect City taxes. If so, how will the Judge of Probate determine the amount of City Taxes due? The only municipality in Montgomery County is the City of Montgomery which operates its own tax collecting agency."

Code 1940, Title 51, § 304 prescribes the procedure whereby lands sold to the State to satisfy unpaid State and County taxes may be redeemed; and Section 312 of the same title provides for the distribution and payment of money paid for redemption under Section 304.

Act No. 578, H. 545, approved July 12, 1943, purports to amend Section 304, supra, by adding thereto a subdivision, marked (f), which is as follows:

"(f) If the lands sought to be redeemed, or any portion thereof, are

situated in any municipality, the redemptioner shall also deposit with the Probate Judge the amount of any unpaid taxes assessed against the same by such municipality, and an amount equal to any municipal taxes thereon which, subsequent to the tax sale, were not assessed by reason of the fact that such land had been purchased by the State of Alabama, plus interest which would have accrued upon such municipal taxes from the time the same would have otherwise become delinquent, which amounts, with interest, shall be treated and distributed in the same manner as taxes and interest thereon."

Act No. 579, H. 547, approved July 10, 1943, purports to amend Section 312: (a) by requiring the probate judge to pay over money received by him under Section 304 to the Tax Collector; (b) by imposing on the Tax Collector the duty of distribution thereof, after deducting therefrom "the commissions allowed by law to Tax Collectors for collecting taxes;" and (c) by requiring the Tax Collector to make monthly reports to the Land Commissioner and the County Treasurer as to lands redeemed; whereas before amendment these duties rested on the probate judge and the probate judge was entitled to commissioners for their performance.

The amendatory acts have created apparently much confusion in the minds of officers affected by them. Request for official opinions as to their construction, operation and effect have been made by the following named judges of probate, to wit: Hon. Norvelle R. Leigh, Jr., Mobile County; Hon. H. R. Howze, Jefferson County; Hon. William W. Hill, Montgomery County; Hon. A. L. Hasty, Marengo County; Hon. John B. Sockwell, Colbert County; and by Hon. H. E. Kendrick, and Hon. J. W. Hamilton, Tax Collectors of Dallas and Jefferson Counties respectively.

With reference to Section 304, as amended, Judge Leigh remarks: "If this section is sufficiently broad to cover all municipalities the probate judges will be put to all kinds of trouble and annoyance and there will be much bickering and many complaints by redemptioners."

The following questions have been raised.:

(1) Whether Section 304, as amended, and subdivision (f) thereof apply only to municipal taxes assessed and collected by county officers pursuant to Code of 1940, Title 37, Sections 698 et seq. or to all municipal taxes assessed or assessable within a county under said Title 37, or otherwise.

(2) Whose duty it is to ascertain the amount of unpaid municipal taxes assessed prior to tax sale and the amount of municipal taxes that might have been assessed subsequent to tax sale if the lands subject to redemption had not been sold to the State, and what proof the probate judge may require with reference thereto, and how such proof may be made.

(3) Whether in case of dispute between the redemptioner and a city or town as to the amount payable by redemptioner on account of municipal taxes, the probate judge is authorized to determine the correct amount.

(4) What authority the probate judge has in cases where, notwithstanding sale to the State, a city or town has continued to assess the lands

sold or has undertaken to foreclose an alleged lien against the same by itself selling the lands either to itself or to some other person.

(5) Whether in case a city or town has itself sold land for taxes the probate judge is authorized to accept money tendered him by the redemptioner on account of municipal taxes and thereby divest the purchaser at the city tax sale of whatever right, title, interest or estate the purchaser may have thereby acquired.

(6) Whether in such cases the probate judge is authorized to require the redemptioner to redeem from the city tax sale as a condition to exercising his right to redeem from the sale to the State.

(7) Whether Section 304, as amended, applies to lands sold for taxes prior to amendment or is confined to lands sold for taxes to the State subsequent to said amendment.

(8) Whether the probate judge is required to collect municipal taxes due and unpaid at the time of sale to the State in cases where up to such time municipal taxes were not assessed and collected by county officers, but were assessed and collected by the city or town itself without the aid of Title 37, Section 69 et seq., supra.

(9) What compensation is allowed to the probate judge for handling redemptions under Section 304, as amended, and what is the effective date of the amendatory act.

(10) Whether under Section 304, as amended, the probate judge is still entitled to fees formerly allowed him under Code 1940, Title 51, Section 312, prior to amendment thereof; and whether the probate judge is allowed 2½% on redemption money paid by him to the tax collector as required by Section 312, as amended.

The question whether an act of the Legislature purporting to amend a section of the code by reference merely to it by number, complies with Section 45 of the Constitution is to be decided by comparison of the Code Section before amendment with the section as it reads after amending. If the title of the amendatory act affords no intimation or notice as to the contents of the body of the act which makes some radical departure from, or addition to, the substance of the Code section sought to be amended, the amendment will not stand. If, in other words, the effect of the amendment is to change or affect some other provision of substantive law not dealt with in the Code section sought to be amended the amendatory act must fall by reason of noncompliance with Section 45. If the amendment injects into or incorporrates in the Code section matter foreign to its original content, or works some material change in other substantive provisions of law, not referred to in the title of the amendatory act, the requirements of Section 45 have not been met.

Kendrick v. State, 218 Ala. 277, 120 So. 142;

State v. Smith, Auditor, 187 Ala. 411, 65 So. 942;

Ex Parte Cowert, 92 Ala. 100, 9 So. 226;

Lindsay v. U. S. Savings & Loan Association, 120 Ala. 156, 24 So. 171;

State ex rel. Lister v. Hawkins, 229 Ala. 144, 155 So. 692;

Board of Revenue v. Jansen, 224 Ala. 240, 139 So. 358;

Dunning v. Holcombe, 203 Ala. 546, 84 So. 740.

Thus in **State ex rel. Lister v. Hawkins,** supra, with reference to an act purporting to amend Code 1923, § 370, relating to appointment and removal of members of the Board of Registrars, by adding thereto a proviso as to appointment and removal in counties of 150,000 population or more, the court considered the effect of the amendment and proviso on the succeeding Section 371. Being of opinion that the amendment to Section 370 operated also to amend Section 371, the Court held the act void under Section 45 of the Constitution. Said the Court:

> "The title to the act gave notice to the legislature and public that only Section 370 would be amended and did not give the slightest notice or hint that Section 371 would be changed or altered, and was in fact a delusion and snare as to a change in Section 371."

In **Board of Revenue v. Jansen,** supra, the court considered an amendment to a designated section of the Code which incorporated into that section provisions whereby the judge of probate might employ help for the Board of Registrars, in addition to employment of assistants for himself, as authorized by the Code section before amendment. Said the Court:

> "It is apparent, therefore, that prior to the amendment of 1931, Section 402 only related to assistants to the probate judge in the performance of his duties which are distinct from those rendered by the registrars. *** The amendment injects a new subject, provides a clerk whose duties in no respect supplement or otherwise relate to what was heretofore provided by that section. It would be more plausible to contend that it was cognate to Section 401 which prescribed the duties of the registrars for whom the clerk by the amendment should render service. But the title merely to amend Section 402 could not give information that its purpose was to provide a clerk for the registrars and not the probate judge. *** "

Evidently the object of Act No. 578, supra, purporting to amend Code 1940, Title 51, § 304, was in case of redemption to charge the probate judge with collecting delinquent taxes for cities and towns which had been assessed, but not collected, upon lands sold to the State, although no efficient, definite or satisfactory mode is prescribed therefor. The act attempts also to place upon the redemptioner a new burden, to wit, **payment of such municipal taxes as could have been assessed against the land if it had not been sold to the State;**—which the probate judge must also collect for the city or town.

This latter feature of the act is altogether novel and surprising. It is in

effect an attempt to assess and collect for the city or town a new category of taxes, and to place in the municipal treasury money to which otherwise it would not be entitled. This one aspect of the act, as to which no implication or hint is given by its title, is in my opinion of itself, according to the authorities above cited, sufficient for its condemnation. The act in effect attempts under the innocent guise of amending a Code section to create a new category of municipal funds, with collection of which the probate judge is charged, as an incident or condition to redemption of lands sold to the State for payment of State and County taxes. In addition to which there is in the act itself nothing to guide the probate judge in the performance of his new duties, for the performance of which all compensation, as well as compensation for performance of old duties, is taken away and given to the tax collector by Section 312, as amended.

The title of Act No. 579, purporting to amend Code 1940, Title 51, § 312, would, I believe, more aptly be, "to repeal" said section.

Said Section 312, relating, before amendment, to distribution of redemption money paid under Section 304 (unamended) on account of State and county taxes, for which services the probate judge received a commission, has by amendment been mutilated beyond recognition. For the original section a new and altogether different section has been substituted, tagged, however, with the same number.

As hereinabove indicated the effect of the new section is to take commissions from the probate judge and give them to the tax collector, and to transfer and assign to the latter duties formerly performed by the probate judge plus a new duty to be performed by the tax collector with reference to municipal tax money.

In addition to this the amendment seems to have been enacted without reference to or consideration of Code 1940, Title 37, § 724, whereby the probate judge was required to pay to the city treasurer municipal tax money paid upon redemptions affected by Sections 698 et seq. of Title 37.

The amendatory act if allowed to stand would inevitably have some effect, or work some change, on the provisions of said Section 724, Title 37. It would at least create conflict, uncertainty and confusion, and would apparently operate to transfer the duty of the probate judge under Section 724 to the tax collector.

I am of opinion, therefore, that this amendatory act No. 579, like its companion No. 578, must be condemned as obnoxious to Section 45 of the Constitution, for the same reasons and upon the same authority applicable to No. 578.

These conclusions make it unnecessary to attempt to answer the various and numerous questions that have been raised by officers affected by these two recent acts, of which I have attempted to make a summary statement at the outset.

I am not unaware of the hesitation with which courts declare acts of Legislature unconstitutional, and of the presumption as to their validity in

most cases. Where, on the other hand, in my opinion an act is so patently and palpably unconstitutional as not to admit of argument, it is, I believe nonetheless my duty to express my opinion to that effect, in the absence of litigation pending to determine the question.

I am of opinion that those amendatory acts are void and should therefore be so regarded by all public officers nominally affected thereby.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 13, 1943.

Hon. E. P. Russell, Director,

Department of Corrections and Institutions,

Capitol.

Corrections and Institutions—Leases—Authority of Director—Title 45, Sections 3, 7, and 65.

The Director of the Department of Corrections and Institutions has authority, with the approval of the Governor, to lease the mulberry grove and equipment used in the production of silk at Atmore, Alabama, for a term extending beyond this administration.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1943, is as follows:

"This department is giving consideration to a proposition submitted by Mr. W. S. Roberts of Anscowain Manufacturing Company of New York City for the leasing of our mulberry grove and equipment used in the production of silk at Atmore, Alabama. Mr. Roberts is asking for a ten year lease, and we wish you to advise us whether or not the writer would have the authority to make a lease extending beyond this administration."

There are two kinds of property involved in the lease referred to in your request, (1) the mulberry grove, which is real property, and (2) the equipment used in the production of the silk, which is personal property.

The answer to your inquiry requires a consideration of two questions, (1) whether or not the Director of the Department of Corrections and Institutions has the authority to lease the mulberry grove and equipment used in the production of silk at Atmore, Alabama, and if so, (2) does he have authority to lease such property for a period extending beyond this administration.

Title 45, Section 65, Code of Alabama 1940, provides as follows:

"§ 65. Renting out state lands.—Such of the lands owned by the state as are not needed for the use of the convict system may be rented out by the director with the approval of the governor."

Under the above set out Section the Director of the Department of Corrections and Institutions, with the approval of the Governor, has authority to lease the mulberry grove at Atmore if it is no longer needed for the use of the convict system of the State.

Title 45, Section 3, Code of Alabama 1940, which defines the functions and duties of the Department provides in part as follows:

"§ 3. Functions and duties.—The functions and duties of the department shall be: To manage, supervise and control all penal and correctional institutions, except as otherwise herein provided. **To sell,** distribute, process, **or otherwise dispose of** all farm products, livestock, or poultry raised, or articles, goods, or wares made or manufactured by use of labor or machinery under the control or supervision of this department, **or any personal property not needed.** *** ." (Emphasis supplied).

Title 45, Section 7, Code of Alabama 1940 provides in part as follows:

"§ 7. Powers of the director of the department of corrections and institutions and how exercised; restrictions thereon.—All functions and duties of the department shall be exercised by the director, *** . The director shall have all power and authority necessary or convenient to carry out the functions and duties of the department. *** ."

Under the provisions Sections 3 and 7, supra, the Director has authority to lease the equipment used in the production of silk at Atmore, Alabama if it is no longer needed for the use of the convict system.

Having come to the conclusion that the Director of the Department of Corrections and Institutions, with the approval of the Governor, has authority to lease the mulberry grove and equipment used in the production of silk, it is my opinion that your inquiry as to whether or not a lease of such property which extends beyond this administration is valid should be answered in the affirmative.

There is no statutory provision which would invalidate such a lease extending beyond this administration. As the lease in question is for a period of ten years it is not necessary to consider the limitations and restrictions imposed on leases under the provisions of Title 47, Section 18, Code of Ala-

bama 1940.

There being no statutory prohibition against such a lease the question then arises as to whether it is void as contrary to public policy in that it usurps the power of a succeeding administration. This question was considered by the Supreme Court of Alabama in the case of **Corning et al. v. Patton,** 236 Ala. 354, 182 So. 39. In this case the Court held that a 50-year lease by the County Commissioners of Jefferson County of a former court house site was not void on the ground that it was contrary to public policy in that it extended beyond the term of the commission making the lease and usurped the power of a succeeding commission.

Cf. Quarterly Report of Attorney General, Volume 12, page 124.

Premises considered, it is my opinion that the Director of the Department of Corrections and Institutions, with the approval of the Governor, has authority to lease the mulberry grove and the equipment used in the production of silk at Atmore, Alabama, for a period extending beyond this administration.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 13, 1943.

Hon. O. L. Andrews,

Clerk of the Circuit Court,

Jefferson County,

Birmingham, Alabama.

Highway Patrol—Arrest Fees—

The only arrest fee that can be taxed as cost, when the arrest is made by a member of the Alabama State Highway Patrol is $2.00 and it is immatrial whether such arrest be for a felony or a misdemeanor.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion bearing date of July 7, 1943, is as follows:

"The present Legislature passed an amendment to Section 71, Title

36, Code 1940, the amendment as follows: 'In all cases where arrests are made by a state highway patrol officer an arrest fee of two dollars for such arrests shall be collected by the proper authorities and promptly turned over to the director of public safety who shall cover the same into the highway patrol fund, and such fees shall become a part thereof to be expended as other monies in said fund are authorized to be expended.'

"Will you please give me an opinion as to whether or not this applies to arrests in felony cases. As you already know, the Code said if a felony we are to charge four dollars for an arrest. Please give me your opinion also, so that I may not make a mistake in distribution, as to whether or not this applies to all misdemeanor cases other than cases that are a violation of the Rules of the Road."

In my opinion Title 36, Section 71, 1940 Code, as amended by 1943 Legislature allows an "arrest fee" of $2.00 in all cases, and no distinction is made between felonies and misdemeanors.

At common law costs were not recoverable by either party in any cause, civil or criminal. **Jones v. Tarleton,** 16 Ala. App. 95, 75 So. 643. There have been many statutory provisions enacted authorizing fees, among them being an arrest fee of $4.00 allowed sheriffs in felony cases. Title 11, Section 100, **1940 Code.** It is probable that this fee has been claimed by the Sheriff of your county in the past and it is also entirely probable that all arrests in felony cases were made by the Sheriff, or one of his deputies. You will note that the pertinent Code section commences: "Sheriffs are entitled to the following fees and allowances in criminal cases *** ."

Title 11, Section 1, 1940 Code, is as follows:

"§ 1. **No fee charged unless expressly authorized.**—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provisions of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all counties of this state."

This section is strictly construed and under it an officer claiming fees must point out definite law authorizing them, and such law cannot be extended beyond its letter, as the state may impose duties on public officers without providing compensation therefor. **Mobile Count v. Williams,** 180 Ala. 639 61 So. 963; **Jefferson County v. Capanes,** 235 Ala. 449, 179 So. 637; Quarterly Reports of Attorney General, Volume XVI, page 71. The payment of a different fee to a different class of officers is nothing new, even when the same service is rendered by each officer. In **Trapp v. State ex rel. Burgan, Clerk,** 122 Ala. 394, 25 So. 194, it was held that a sheriff executing a warrant of arrest issued by a committing magistrate was entitled to a fee of $2.00 while a constable's fee for the same service was fixed at only 50 cents. It necessarily follows that where a statute does not provide for different fees in felony and misdemeanor arrests, only the fee provided may be taxed as costs.

Your attention is also called to the fact that the State Highway Patrol

Officers now have the same authority to make arrests as the "peace officers" and the arrest fee of $2.00 must be taxed as part of the cost where the arrest is made by a Highway Patrol Officer, regardless of the character or type of the offense.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 14, 1943.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Capitol.

Escambia County—Local Acts 1935, Page 153—Title 13, Section 424, Code of Alabama 1940—

Local Act No. 255, approved August 21, 1935, Local Acts of Alabama 1935, page 153, regulating the issuance of warrants of arrest returnable to the Circuit Court or County Court of Escambia County discussed generally.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion bearing date of August 5, 1943, is as follows:

"Will you please render me an opinion in connection with the following matter?

"Sections 1 and 2 of Local Act No. 255, Local Acts 1935, page 153, read as follows:

"Section 1: Before the issuance of any warrants of arrest in Escambia County, Alabama, by any Justice of the Peace of any precinct in said County, or by any Notary Public having the jurisdiction and powers of a Justice of Peace in said County, returnable to Circuit Court or County Court, either the Circuit Solicitor or his Deputy Solicitor for said County or the County Solicitor be, and he hereby is required to make an investigation of the facts set out in the affidavit; and if in his opinion a conviction can be had, he shall indorse on either the affidavit

or the warrant his approval and sign his name thereto.

"Section 2: Except where an offense is committed in the presence of an arresting officer, or where there is a Grand Jury indictment, or where the offense is one which may be punished capitally, neither the sheriff, nor any of his deputies shall make any arrest except upon a warrant duly issued and bearing the written approval of either the Circuit Solicitor or his Deputy or the County Solicitor of Escambia County.

"Please advise, if under the above quoted Local Act, if the County Solicitor is within his authority, to amend a complaint or warrant, after the defendant has been bound over to wait action of the Grand Jury, by reducing the charge from a felony to a misdemeanor, and does he have authority in like cases to order the Clerk of the Circuit Clerk to strike same form the Grand Jury Docket and enter on the Docket of the County Court?

"Does the County Solicitor have authority under the above Local Act, after a defendant is bound over to await action of the Grand Jury, to order the Clerk of the Circuit Court to issue a certificate to the Sheriff for the release of the defendant prior to and before the Grand Jury had an opportunity to act on same?

"We are currently making an examination where your advice in this matter is needed. I should thank you to give this request your special attention."

The Local Act to which reference is made in your inquiry is in derogation of the general law pertaining to the issuance of warrants by justices of the peace. Its enactment, no doubt, was aimed at suppressing the issuance of warrants in cases where malice or prejudice were the controlling motives, or in cases of such frivolous character as not to warrant prosecution.

Pretermitting the question of the legality of the action of the solicitor in amending a complaint or warrant in such manner as to reduce the offense from a felony to a misdemeanor, this act does not confer upon the circuit solicitor, deputy solicitor or the county solicitor the authority to amend the affidavit or warrant and thereby change the offense for which a defendant is charged after such defendant has been bound over to await the action of the grand jury. The only authority such prosecuting officer has under this act is to make an investigation of the facts set forth in the affidavit, to ascertain whether or not, in his opinion, a conviction can be had based upon the facts so alleged, and to endorse his approval on the affidavit or warrant in the event he determines that a conviction can be had.

There is not even a casual connection between the questions posed in your inquiry and the Local Act here under consideration. The justice of the peace is without jurisdiction to hear and determine a case made by a warrant which was issued by him, but made returnable to another court. Only the court to which the warrant was returnable has jurisdiction to continue the prosecution.

Both of your questions are so framed as to presuppose that the justice

of the peace acted in all things regular. At any rate a warrant was issued, a day fixed for hearing the charges and the defendant was then bound over to await the action of the grand jury.

Title 13, Section 424, Code of 1940 provides as follows:

"§ 424. **Proceedings when defendant demands trial by jury.**—If the defendant demands a trial by jury, he must be required to enter into bond, with good sureties conditioned for his appearance at the next session of the circuit court of the county to answer the charge; and, failing to give such bond, must be committed to the county jail until the next session of the circuit court having jurisdiction of the offense, unless he elect, in the meantime, to perform hard labor for the county as provided by law."

This office has held, citing many cases, that if a defendant makes the demand for trial by jury and provides the bond required, the demand and giving of such bond under the above section automatically and effectively transfers the case to the circuit court and the circuit court obtains absolute and exclusive jurisdiction of the case and of the defendant. **Quarterly Report of Attorney General,** Volume XXV, page 137.

The general rule is that when a case reaches the circuit court the only process by which the prosecution can continue is by indictment by a grand jury. **Streanger v. State,** 21 Ala. App. 630, 110 So. 595. For an exception to the rule see **Collins v. State,** 218 Ala. 250; 118 So. 265.

I do not know with what offense the defendant was charged in this matter. If it was an indictable offense, within the meaning of Section 8 of the Bill of Rights, and, unless express authority has been conferred upon the circuit court by the Legislature to try such cause without an indictment by a grand jury, (**Collins v. State,** supra), Section 8 of the Constitution forbids the circuit court to continue the prosecution until the cause has been investigated by its grand jury and an indictment returned into open court. **Streanger v. State,** supra.

I do not understand the law to be that a prosecuting officer can substitute himself for the inquisitorial body of the county, and amend an affidavit or warrant in such manner as to reduce a felony to a misdemeanor. Certainly the Local Act mentioned in your request does not confer any such authority upon the solicitor. It is not necessary for me to decide in this connection whether the Legislature could confer such power and authority without doing violence to the organic law.

Premises considered, it is my opinion that the county solicitor is without authority under Local Act No. 255, Local Acts 1935, page 153, to amend a complaint or warrant after the defendant has been bound over to await the action of the grand jury, by reducing the charges from a felony to a misdemeanor. Nor does the county solicitor have authority in like cases to order the clerk of the circuit court to strike same from the grand jury docket and enter same on the docket of the county court. Likewise, the county solicitor is without authority, under said Local Act, after a defendant is bound over to await the action of the grand jury, to order the clerk of the circuit court

to issue a certificate to the sheriff for the release of the defendant prior to and before the grand jury has made an investigation into the charges.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 16, 1943.

Hon. E. C. Gates, Mayor,

Lockhart, Alabama.

Municipality cannot impose license on motor propelled carriers engaged solely in interstate commerce.

Municipality cannot impose license on motor propelled carriers operating merely through such municipality without engaging in any other business therein.

Ordinance exceeding municipal competency is void.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1943, is as follows:

"Please give me, as Mayor of Lockhart, an opinion as to the validity of the license ordinance of said town levying a license on trucks and buses hauling passengers for hire from the Town of Lockhart.

"We have a situation in this locality which is causing the municipal governments a great deal of worry. Many people who reside in this section of the State are hauling, for hire, passengers to various defense jobs in both Alabama and Florida and they maintain a regular schedule and stop in the Town of Lockhart and take on passengers and upon their return they unload passengers in the Town. This action is in competition to the bus companies who operate under the Public Service Commission and pay a license for their privilege.

"The truck and bus operators do not carry these people, or passengers, on a 'share ride proposition' but carry them for a fixed sum, or fare, and make regular trips daily, also operating on a schedule at the various points in the Town and Police jurisdiction.

"Since passing the inclosed ordinance they have refused to pay the license and the Mayor and Council desire an opinion before attempting to enforce the same."

"Resolution No. 26.

"1. WHEREAS, the Town of Lockhart is desirous of licensing the operation of trucks and buses hauling passengers for hire from the Town of Lockhart. Now, therefore, be it resolved that the license ordinance of the Town of Lockhart be amended fixing an annual license of $25.00 per year on all buses and trucks and pick-up trucks hauling passengers for hire to and from or through the Town of Lockhart.

"2. BE IT FURTHER RESOLVED, that this license for the balance of the fiscal year, ending September 30, 1943, shall be $5.00.

(Signed) "E. C. Gates

Mayor

"Authenticated by:

Town Clerk.

"This 22nd day of July, 1943."

In my opinion this ordinance must be held void.

It appears that the Town of Lockhart has exceeded its authority in two aspects: first, the ordinance is sufficiently board as to include interstate commerce, second, its terms impose a license on carriers who merely operate through the corporate limits without transacting any other business in the town.

Statutes and ordinances imposing a license tax must be construed most strongly against the taxing authority. **Williams v. Pugh,** 23 Ala. Auu. 27, 129 So. 792; **Carruth v. State,** 24 Ala. App. 158, 132 So. 65; **State v. Dr. Pepper Bottling Co.,** 26 Ala. App. 125, 155 So. 92; **Dorby v. State Tax Commission,** 234 Ala. 150, 174 So. 233.

An ordinance in excess of the powers of a municipality is void. **Kreulhaus v. Birmingham,** 164 Ala. 623, 51 So. 297; for application of the same rule, though not quite so apposite, see **Thompson v. City of Sylacauga,** 30 Ala. App. 72, 200 So. 795.

It appears from your statement of facts that the Town of Lockhart intends to impose this license on non-residents who transport passengers from Alabama into Florida, and the wording of the ordinance is sufficient to include such transportation, if the municipality has the authority to impose a license on same. However, it has been repeatedly held that a municipality cannot impose a license on interstate commerce. **Quarterly Report of the**

Attorney General, Vol. XVIII, page 56; **City of Roanoke v. Stewart Supply Co.,** 235 Ala. 23, 176 So. 820.

The authority for imposition of a municipal license on motor propelled carriers is found under Title 37, § 746, 1940 Code, and is limited to "motor propelled common carriers and motor propelled contract carriers where such common carriers or contract carriers do business in said town or city by maintaining depots, stations, or terminal facilities therein or by receiving passengers or freight for transportation for hire from said city or town to another point in Alabama, or from other points in Alabama to said city or town."

It necessarily follows that the ordinance in question, failing in municipal competency in part must fail in toto.

It is recommended, in the event the Town of Lockhart desires to impose a license on this class of business, that the wording and provisions of Title 37, § 746 and Title 37, § 455 et seq. 1940 Code, be followed.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 16, 1943.

Hon. D. P. Wimberly,

Attorney at Law,

Scottsboro, Alabama.

Court of County Commissioners—Unconstitutionality—Section 106, Constitution 1901—Local Act No. 356, Acts of Alabama 1943—Jackson County.

Failure of notice of intention to apply for passage of local act to include fact that members of Board of Revenue of Jackson County shall be elected from County at large instead of each of four districts of County electing one member pursuant to a local act of 1879, and omission from notice of other matters of substance contained in Act, renders Act a violation of Section 196, Constitution 1901.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of July 24, 1943, is as follows:

"RE: Local Act Jackson County No. 356 H-797 Armstrong—Approved June 30, 1943.

"1. Is this Act constitutional?

"2. Does it not violate Sections 106 and 45 of the Constitution?

"3. Said Act repeals Local Act of Jackson County, No. 177, S.B.92 Acts, 1878-1879 page 208, and no reference is made to the repealing of said Act in the notice published.

"4. Does the title of said Act and the notice published fairly advise the reader of its material and substantial provisions?

"5. The Act repeals the law creating four districts in Jackson County and directs the election of the members of the Board of Revenue from the County at large, and not from Districts, and no notice of this purpose was published, and this action appears to be a substantial change from the Act as published. Does this change vitiate the Act?

"I am enclosing you herewith a true copy of the Act. The title of this Act was published in the Jackson County Sentinel, a newspaper published in Jackson County for four successive weeks. I do not have access to the Journals of the House and Senate, and am assuming that they are regular.

"I am acting as County Attorney for Jackson County's Commissioners Court, and the validity of this Act vel non is of great importance to our county and an early opinion from your office will be greatly appreciated."

In reply to your request, it is my opinion that Act No. 356, H. 797, Local Acts of Alabama, 1943, the statute to which you refer, is unconstitutional in that it violates Section 106 of the Constitution of 1901.

That part of Section 106, Constitution of 1901 which is pertinent to your inquiry reads as follows:

"No *** local law shall be passed *** unless notice of the intention to apply therefor shall have been published without cost, to the state in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law. *** ."

This constitutional requirement of notice, according to judicial construction, was designed to apprise those persons who would be affected by a proposed statute of the provisions thereof. Every reasonable intendment is resolved in favor of the constitutionality of an act of the Legislature, but the failure of a notice of a local act to inform the people interested therein of the substance thereof has consistently compelled our Courts to declare the same unconstitutional.

The published notice merely stated that the proposed statute will establish a Board of Revenue to be composed of five members, designates the manner of appointing the first board, and provides for the election of such members at the expiration of the term of office of the first board. The Act itself provided that such members shall be elected from the county at large. Since the enactment of a statute in 1879 (Acts of Alabama, 1878-1879, page 208) the members of the commissioners court of Jackson County have been elected from four districts in the county, the qualified voters of each district electing one commissioner. It is my opinion that the failure of the published notice to expressly inform the readers thereof that the members of the Board of Revenue were to be elected from the county at large was an omission of a matter of substance which should have been included in such notice, particularly in view of the fact that it was a material change in the manner in which Jackson County elected its governing body.

The notice further stated that the proposed act fixes the compensation of the members of the Board of Revenue. The Act provides a salary of $200.00 per month for the Chairman of the Board and $7.50 per day, not in excess of $75.00 per month, for the associate members thereof. In my opinion this decided increase in salaries was a matter of substance which should have been included in the notice inasmuch as heretofore each member of the commission received a salary of $85.00 per month with the exception of the Judge of Probate, who served as Chairman without pay. (Local Acts of Alabama 1936-37, page 72)

Other provisions of the Act which were omitted from the notice included designation of the fund from which salaries were to be paid, the granting of authority to the Board to compromise the outstanding debts of Jackson County, reregister warrants, and pledge the credit of the county to raise money to discharge the same.

All of these are matters of substance to which the electors of Jackson County are entitled to notice before they become a part of the law governing them. A contrary conclusion would defeat the purpose of Section 106 of the Constitution of 1901.

The Supreme Court of Alabama in the case of **State vs. Brooks,** 241 Ala. 55, 1 So. 2d 370, declared a similar local act unconstitutional. In deciding this case the court stated as follows:

> "No indication is given by the notice that the salaries of the respective members of the board are to be doubled, with compensation in part out of the road and bridge fund and the gasoline fund as well as the general fund, and their method of election changed as well as to some change in the method of filling vacancies; that authority is to be given the board to employ an additional deputy sheriff and fix his compensation as the board 'may deem advisable'; that the board be given unlimited authority in expenditure of money of the county for establishing community houses, or similar projects including recreation parks; to expend funds for advertisement for new industries; to establish a contingent fund of $5,000 to be expended as the board deems advisable and for the best interest of the county; to purchase and install voting machines *** ."

Inasmuch as this is the latest expression of the Supreme Court of Ala-

bama relating to a local act similar to the Act in question, particularly concerning a change in the manner of electing the county governing body, I am constrained to follow the same reasoning, which unequivocally stamps the said Local Act No. 356 as a violation of Section 106, Constitution of Alabama 1901.

As it is my opinion that the Act in question is violative of Section 106, Constitution 1901, it is not deemed necessary to answer your further questions concerning its validity under other constitutional provisions.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 17, 1943.

Hon. Charles W. Thompson,

Superintendent of Education,

Coosa County,

Rockford, Alabama.

Schools—Coosa County—Term of Superintendents—Office Help—Act No. 23, Local Acts 1943—

1. Office help of County Board of Education of Coosa County limited to one clerk or secretary at a salary not to exceed $150 per month.

2. Present term of Superintendent of Education of Coosa County expires on the first Monday after the second Tuesday in January, 1945.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of August 3, 1943, is as follows:

"I should like to have your opinion on Sections 5 and 6 of the Local Bill, H. 140—McDonald.

"In the first sentence of Section 5 the statement is made that the Coosa County Board of Education shall determine the amount of office help for said County Superintendent of Education. In the latter part

of the Section the statement is made that only one secretary shall be furnished for such office help. The point that I wish to know is how can the first statement which says that the Board of Education may determine the amount of office help and then in the same Section the Board of Education is restricted to providing only one secretary be reconciled?

"The Coosa County Board of Education in a meeting of April 16, 1943 appointed me for a two-year term beginning with July 1, 1943, and ending with June 30, 1945. Section I of this Local Bill states that the person who is elected in the general election in the fall of 1944 shall take office on the first Monday after the second Tuesday in January in 1945. Section 6 of the Local Bill states that all laws and parts of laws in conflict with the provisions of this act, insofar as they relate to Coosa County, Alabama, be and the same are hereby repealed. This Local Bill was approved on May 20, 1943. The point that I wish to know about is this: Will my appointed term come to an end on the date specified in Section I of this Local Bill?"

Act No. 23, H. 140, approved May 20, 1943, Local Acts of 1943, provides, in part, as follows:

"Section 5. The County Board of Education of Coosa County, Alabama, shall determine the amount and salary of office help for said county superintendent of education and said superintendent of education shall have the authority to select such office help as may be provided by said Board of Education and the salary of such help shall be paid at the time and in the manner now provided by the general laws of the State of Alabama for the payment of such office help or as may hereafter be provided by the general laws of said State and, if no such provision shall be made by the general laws of said State, then the Board of Education may fix the time and manner of such payment, provided that only one clerk or secretary shall be furnished for such office help and the salary or compensation of such clerk or secretary shall not exceed one hundred Fifty dollars ($150) per month. The County Board of Education of said county is authorized to furnish, as provided by the general law of the State of Alabama, the expenses of the superintendent of education and allowances for his office which shall be allowed by the County Board of Education as authorized under the general laws of Alabama."

While it is true that Section 5 is ambiguous in that it authorizes the county board of education to determine the amount and salary of the office help and then provides that the office help be limited to one clerk or secretary at a salary not to exceed $150 per month, such ambiguity does not render the statute invalid. It is a well-known rule of statutory construction that general terms must yield to the more specific terms of a statute. **Marengo County v. Wilcox County,** 215 Ala. 640, 112 So. 243. It is, therefore, my opinion that under the provisions of Section 5, supra, that County Board of Education of Coosa County would be limited to one clerk or secretary at a salary not to exceed $150 per month.

In answer to your second inquiry, your attention is directed to Section 1 of Act No. 23, which provides as follows:

"Section 1. At the general election for the year 1944, and every four years thereafter, there shall be elected a County Superintendent of Education for Coosa County, Alabama, by the qualified voters of said county, who shall hold office for a term of four years from the first Monday after the second Tuesday in January next after his election, and until a successor is elected and qualified."

The language used in this section is plain and unambiguous, and the express provisions of this section must prevail. **State v. Praetorians,** 226 Ala. 259, 146 So. 411.

Local Acts prevail over general statutes in so far as they are applicable. **Alabama Digest,** Statute, Key No. 163.

The Legislature has authority to abolish or shorten the term of a legislative office. **State v. Stone,** 240 Ala. 677, 200 So. 756; 43 **American Jurisprudence,** Public Officers, Section 151.

It therefore follows that your present term of office will expire on the first Monday after the second Tuesday in January, 1945.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 17, 1943.

Hon. A. B. Jefferies, Chairman,

Board of Revenue and Road Commissioners,

Mobile County,

Mobile, Alabama.

Mobile County—Tax Assessors—Constitutionality—Title 62, Section 43, Code of 1940—Constitution 1901, Sections 85, 106.

1. Section 106, Constitution 1901, requiring publication of notice of intention to apply for passage of local law, does not extend to local laws which are enacted by the adoption of the Code.

2. Title 62, Section 43, Code of 1940, although applicable only to Mobile County, is not a violation of Section 106, Constitution 1901, notwithstanding notice thereof was not published.

3. Section 85, Constitution 1901, requires Legislature to codify the laws, and considered in pari materia with Section 106, Constitution 1901, authorizes Legislature to adopt code without requirement of publication of notice of local laws therein.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1943, is as follows:

"The Tax Assessor of Mobile County has made a requisition of the Board of Revenue and Road Commissioners of Mobile County for the purchase of an automobile to be used by him in the conduct of the affairs of his office, and the furnishing of such gasoline as might be necessary in the operation of the said automobile.

"An Act of the Legislature approved on February 20, 1937, and appearing on page 121 of the General and Local Acts of the Extra Session of the Legislature of 1936-1937, provided for the furnishing of an automobile to the Tax Assessor and the furnishing of gasoline necessary for its operation on the requisition of the Tax Assessor. Section 5 of said Act provided as follows:

" 'This Act shall take effect on its passage and approval and be in force and effect until October 1, 1938.'

"This Act, which under its terms had expired prior to the time of the adoption of the Code of Alabama of 1940, now appears as Section 43, Title 62 of the Code of 1940, and, under the terms of the Code applies only to the County of Mobile.

"I would appreciate your advising me whether or not, in your opinion, this section of the Code is now effective, or is unconstitutional in that it constitutes a local law which was not published in compliance with constitutional provisions. Should you be of the opinion that the said Section of the Code is not effective, because of its unconstitutionality or otherwise, I would then appreciate your advising me as to whether or not, in your opinion, an Act of the Legislature approved on July 10, 1940, and appearing on page 1028 of the General Acts of the Regular and Special Session of 1939 is sufficiently broad to authorize the Board of Revenue and Road Commissioners of Mobile County to supply the said automobile and gasoline to the Tax Assessor, or if the said Act relates only to the furnishing of equipment, supplies and other necessaries for the conduct of his office proper, and not to the furnishing of automotive equipment."

In answer to your request it is my opinion that Title 62, Section 43, Code of 1940 is not unconstitutional.

This statute, inter alia, provides for the furnishing of an automobile and gasoline to the Tax Assessor of Mobile County for use in his official capacity. The language of this statute is taken from an act approved on February 20, 1937, found in General and Local Acts of Alabama 1936-37, page 120, which, contrary to Title 62, Section 43, Code of 1940, was a general act operative in counties within a designated classification based upon population, and was to remain effective until October 1, 1938. However, inasmuch as the period of operation of the act approved in 1937 had expired at the time of the codification of the laws of Alabama in 1940, the sole question is, in effect, whether the Legislature may enact a local law in the Code without the publication of notice thereof as required by Section 106, Constitution 1901.

The courts of Alabama have consistently indulged in every reasonable intendment in favor of the constitutionality of an act of the Legislature. As evidenced by the case of **State ex rel. Meyer vs. Greene, Judge of Probate,** 154 Ala. 249, 46 So. 268, the legislative branch of the state government inherently possesses plenary power subject only to certain limitations imposed by the Constitution, and the court may not declare a statute invalid until it is proved beyond a reasonable doubt that a constitutional provision has been violated.

Section 106, Constitution 1901, requires the publication of notice of the intention to apply for the enactment of a local law. This provision has been declared by the courts to establish a condition precedent to the validity of a local law enacted through regular legislative channels. Inasmuch as the Code of 1940 is the first code to contain local laws, the Supreme Court of Alabama has had no occasion to declare whether the constitutional requirement of notice applies to local laws enacted by the adoption of a code.

However, other constitutional provisions pertaining to the titles of acts, amendments thereto, and the course of procedure through the Legislature, all intended to acquaint the reader with the substance and effect of pending legislation, have been held inapplicable to the codification of laws (**Gibson vs. State,** 214 Ala. 38, 106 So. 231; **Ex Parte Thomas,** 113 Ala. 1, 21 So. 369, in re Opinion of the Justices ..... Ala. ..... (manuscript)). The **Thomas** case held that a code was not within the letter or spirit of the man-

date of the Constitution designed to remedy legislative evils in the enactment of statutes. The cases concerning this question consistently refer to Section 85, Constitution 1901, which section places upon the Legislature a duty to codify the laws. The said Section 85 has been held to place an additional requirement upon the Legislature, and it is my opinion that this additional requirement is not subordinate to the requirement of notice in Section 106, Constitution 1901, rather it recognizes a difference in the enactment and codification of statutes.

Sections 85 and 106 of the Constitution of 1901 must be construed in pari materia, each placing certain duties upon the Legislature. The evils sought to be remedied by Section 106 were not contemplated to arise in the codification of statutes. Therefore, it is my opinion, based upon the analogy furnished by the above-cited cases, that the said Section 106 can not be construed to impose a limitation upon the duty required by Section 85.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 18, 1943

Hon. J. L. Pickett, Sheriff,

Bullock County,

Union Springs, Alabama.

Juvenile Court—Sheriffs—Costs and fees—

In Juvenile Court Sheriff's costs and fees same as allowed for like services in Circuit Court, and are paid by the County out of the General Fund.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

This will acknowledge receipt of your request for an official opinion dated March 18, 1943, which is as follows:

"Please advise me as to my fees in Juvenile Court. I execute a warrant from this court by committing a prisoner to jail and later he is brought before said court and found guilty and placed in the custody of his parents. I am desirous to know if it correct for me to present a bill against the General fund of County for arrest and guard fee along with amount for feeding prisoner. I am especially anxious to know about the guard fee in such a case. I would also like to know if I am entitled to

$2.00 or $4.00 for arrest. Said case originated in Juvenile court and was disposed of there."

Inasmuch as the Juvenile Court of Bullock County is not provided for in the special statutes creating such courts for certain designated counties, it will be necessary in answer to your inquiry to refer to the general laws governing Juvenile Courts. These provisions of law are found in Title 13, Sections 350 to 388, Code of 1940, and reference is here made to two of those provisions which furnish the information requested by you. Title 13, Section 351, Code of 1940, provides in part as follows:

" *** All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses of maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter, shall be valid charges and preferred claims against the county and shall be paid by the county treasurer when itemized and sworn to by the creditor or other persons knowing the facts in the case, and approved by the judge."

Title 13, Section 383, Code of 1940, reads as follows:

"§ 383. Officer serving process, etc. under juvenile courts; costs and fees of.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction."

By virtue of the first above quoted provision the proper costs and fees incurred by you are chargeable against and payable from the General Fund of the County. By virtue of the second above quoted statute these proper costs and fees include arrest and guard fees and cost for feeding the person arrested; and the sheriff is entitled to the amount to which he would be entitled for rendering like services in the Circuit Courts.

For services rendered in the Circuit Courts the law provides the sum of two dollars as arrest fee in misdemeanor cases and the sum of four dollars as arrest fee in felony cases. The guard fee is in the sum of two dollars in all felony cases, in all arrests under indictment whether followed by conviction or not, and in all other cases where conviction follows arrest. Pursuant to the above quoted Section 383 you are entitled to similar sums for arrest and guard fees in Juvenile cases.

With reference to the cost of feeding the arrested person your attention is directed to an enclosed opinion of this office under date of August 5, 1939 to Hon. Henry W. Smith, Sheriff, Etowah County, Quarterly Report of Attorney General, Vol. XVI, page 126, which opinion ruled that the sheriff of a county must present his claim to the Court of County Commissioners to be audited and allowed by them for the feeding of Juvenile delinquents committed to jail; and if such claim is based upon the actual necessary expenses incurred by the sheriff, allowance thereof is proper and legal. How-

ever, inasmuch as it has been consistently held that juvenile delinquents are not prisoners in the sense the term is applied to criminals, then the general statutory provisions for the feeding of prisoners are inapplicable. It is only by virtue of the above quoted Section 351 that the sheriff is entitled to present his bill to the county for the actual costs incurred in feeding the juvenile delinquents.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 19, 1943.

Hon. Gordon Persons,

Associate Commissioner,

Alabama Public Service Commission,

Montgomery, Alabama.

Public Utilities—

1. A water utility doing business in this State under the control and supervision of the Commission is not exempt under Section 19 of Title 48 of the Code from the control and supervision of the Commission should it undertake to generate electricity and supply it to a utility for such utility's own use or to be distributed by it to consumers.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of August 7, 1943, is as follows:

"Company 'A' is now in the business of a public utility, supplying **water,** under a certificate granted by this Commission. Company 'A' now proposes to generate electricity, but instead of selling the electricity direct to consumers, they propose to sell the output of its plant to Company 'B', at wholesale rates, and Company 'B' will handle the distribution and sale of electricity to consumers.

"We would like an opinion from your office as to whether or not Company 'A', being a certificated **water utility,** comes under the jurisdiction of the Public Service Commission in its proposed sale of electricity.

"We refer you to Section 19, Title 48 of the 1940 Code of Alabama which reads as follows:

> " 'Limitations and exceptions as to certain utilities. None of the provisions of this title shall apply to the generation, transmission or distribution of electricity, to the manufacture, or distribution of gas, to the furnishing or distribution of water, or to the production, delivery or furnishing of steam for heat or power by a producer who is not otherwise a utility, for the sole use of such producer, **nor shall they apply to any person not otherwise a utility who manufactures and supplies such products to a utility for its use or distribution without participation by such manufacturer in such use or distribution.** When a person is engaged in business, a portion of which business is private business and a portion of which is the business of a utility, the authority, power and jurisdiction of the Commission conferred upon it by law, shall not be deemed to apply to and shall not be exercised with respect to, that portion of said business which is a private business.'

"That part of this Section which is pertinent to our question is underscored. In my opinion, if Company 'A' was, we will say, a grist mill, it certainly would not come within the jurisdiction of this Commission, under the terms of the plan as outlined above. However, I call your attention to the fact that the same Section, in that part which is underscored, reads, 'not otherwise a utility.' It is our opinion, therefore, that Company 'A', being a certificated water utility, does come under the jurisdiction of the Public Service Commission in its proposed sale of electricity."

Your question calls for a construction of the provisions of Section 19, Title 48, Code of 1940. To fully understand the meaning of the section its provisions must be considered in the light of the entire Title 48 and, more particularly Sections 16, 17, and 302 of this title.

Sections 17 and 18 vest in the Commission exclusive general supervision of all persons, firms, and corporations operating utilities named in Title 48.

The act makes its own definitions of utilities; Section 16 provides that the word "utility or utilities," used in Chapter 1, shall include all utilities defined under Sections 102, 239, 270 and 302 of this title.

Section 302 defines the meaning to be given to certain words used in the public utilities enactment. The second paragraph of this section defines the term utility in this wise: "The term utility when used in this Chapter shall mean and include every person not engaged solely in interstate business that now or may hereafter own, operate, lease, or control," the following named businesses, defined to be utilities by subdivisions numbered (1), (2), —(9), inclusive.

The businesses named in subdivisions (3), (4), (5) and (6) shed light on Section 19, of Title 48, now under consideration. These subdivisions define as utilities plants, property or facility for the generation, transmission or distribution, sale, or furnishing to **or for the public** of electricity.

Subdivisions (4), (5) and (6) define as utilities gas utilities, water utilities and utilities producing and furnishing steam for heat or power or other use where the same is furnished to **or for the public.**

Each of these sections, in defining named utilities, uses the exact language "furnishing to **or for the public.**" (Italics supplied). This quoted phrase is a distinguishing mark that constitutes the plants or business public utility.

Keeping these sections and definitions in mind, we will examine Section 19, Title 48, inquired about in your letter. We note that the businesses of the utilities in Section 302, are the same businesses that are being discussed in said Section 19. Thus it becomes manifest that these provisions of Section 19 were intended to exempt persons who were producing electricity, gas, water, or steam power solely for their own use or that of their tenants as they were not utilities under the definitions of Subsections (3), (4), (5), and (6) of Section 302, Title 48, and therefore exempted from the provisions of the law.

It may be true that applying general principles of law as to what constituted a public utility that these persons so acting were exempt without these provisions of Section 19. If this be true, then these exemptions change no principle of law and amount to no more than an act of superabundance of care on the part of the Legislature.

The further provision, which is under immediate consideration, is as follows: "nor shall they apply to any person **not otherwise a utility** who manufactures and supplies such products to a utility for its use or distribution without participation by such manufacturer in such use or distribution." (Italics supplied).

The quoted provisions undertook to add another and different exemption from the public utilities act, by providing that electricity, gas, water, and steam power may be manufactured and supplied to these defined utilities for its own use or for distribution by it to the public and it names the persons who may do this and exempts them from the control and jurisdiction of the law and, therefore, from the Commission.

The vital question is presented, what persons may manufacture and furnish these named commodities to a public utility and be exempt from the influence and requirements of the utility law? The word person includes individuals, associations, corporations, etc., as defined in said Section 302, Title 48.

The phrase "not otherwise a utility" must have been intended by the lawmakers to mean something. It is our duty and that of the courts to assume that the Legislature had a purpose in the use of the phrase "any person not otherwise a utility," and to ascertain and declare that purpose. We are not permitted to conclude that the Legislature through sheer ignorance attached "not otherwise" to the words "any person." Manifestly the words not otherwise qualify the word and limit the persons who may furnish the named products to utilities for its use or distribution. It also has reference to the words "to a utility for its use" etc. Concededly the phrase means that

the person exempt must be one not a utility in any sense other than the manner and act of furnishing to the utility for its use or distribution.

It is entirely clear from the whole law on the subject that public utilities of the class named should not be exempt from the utility law. Probably it was not necessary, as a matter of law, to have used the expression "not otherwise a utility," but if this be true, it does not change the effect of the provisions of Section 19. We can conceive of no reason why a public utility should be exempt, but, on the contrary, upon a reading of the entire statute on the subject many reasons will at once become manifest why they should not be exempt. To do so would at once seriously complicate and involve the administration of the utility laws. The statute gives sweeping powers to the Commission over utilities, such as inspection of the plants, the manner of serving the public, the regulation in its manner of bookkeeping, and a great many regulatory provisions not here practicable to be recited. Such exemption could open the way for undesirable and fraudulent relations between the utilities and involve the Commission in endless litigation. However, the very language of said Section 19 unmistakably shows that public utilities were not intended to be exempted from the provisions of the utility law.

From the foregoing it must follow that public utility companies operating under the utility law are not exempt from control of the Commission by virtue of Section 19, of Title 48, of the Code. And this being true, it follows that a water utility company operating in this State under a certificate granted by the Commission is not exempt from the provisions of the law so as to allow it to generate for or transmit electricity to another utility for the latter's use or for distribution by it.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 20, 1943.

Hon. I. C. Heck,

State Comptroller,

Capitol.

Code 1940, Titl. 13, § 240, Tit. 41, § 154—Act No. 238 H. 495, approved June 22, 1943—Circuit Solicitors—Subsistence Expenses—

Act No. 238, H. 495, approved June 22, 1943, does not operate to amend Code 1940, Tit. 13, § 240, fixing maximum subsistence expense allowance of $5 daily for circuit and other solicitors while performing official duties outside their circuits.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 12, 1943, is as follows:

"Section 240 of Title 13 of the Code of Alabama, 1940, provides reimbursement for transportation and subsistence for any circuit solicitor, deputy circuit solicitor, or assistant deputy circuit solicitor who is ordered to prosecute any case, or work with any grand jury, or discharge any other duty outside of the circuit for which he has been elected or appointed.

"The above Section provides reimbursement for subsistence for an amount not to exceed $5.00 per day.

"Act No. 238 of the 1943 Alabama Legislature provides an amount of not less than $4.00 per day and not more than $5.00 per day for expenses other than actual expenses of traveling within the State of Alabama. The Governor, by Proclamation, set the maximum at $4.00 per day.

"Please let us have your official opinion as to whether we shall make reimbursement to circuit solicitors, deputy circuit solicitors, or assistant deputy circuit solicitors, as referred to above, on a basis of $5.00 per day for subsistence, or on the basis of $4.00 per day for subsistence, as per the above referred to Act No. 238 and the Governor's Proclamation setting the maximum of $4.00 per day."

Section 240, Title 13, of the Code of 1940, was taken from Section 3 of Act No. 329, H. 147, approved August 31, 1939, (Gen. Acts 1939, pages 468, 471) with slight verbal variation. In the Act solicitors are allowed, for performance of official duty outside their circuits, "actual expenses for transportation and not to exceed $5.00 per day for hotel and meals;" and in the Code the allowance is "actual expenses for transportation, and a maximum of five dollars per day for subsistence."

As against the limitation of traveling expenses and "subsistence" for persons "traveling in the service of the State" fixed before amendment by Tit. 41, § 154 of the Code, it is my opinion that the maximum $5.00 subsistence limit fixed for solicitors in Tit. 13, § 240 would prevail. Both sections were adopted as part of the statutory law of the State by Act No. 628, approved July 2, 1940, (General Acts 1939, p. 995) and both, by proclamation of the Governor, became effective May 31, 1941. To each section, or statute, a field of operation must be accorded, and whatever apparent clash or conflict might have arisen between them would be resolved in favor of the more specific provisions as to maximum allowance appearing in Tit. 13, § 240.

Where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each. **State v. Martin,** 160 Ala. 181, 48 So. 847.

Inasmuch, therefore, as both statutes must be taken as valid, legal enactments as they appear in the Code, the next question for consideration is, What effect, if any, does the amendment of Tit. 41, § 154, by Act No. 238, H. 495, approved June 22, 1943, have upon Code 1940, Tit. 13, § 240.

Said Act of June 22, 1943, is entitled "An Act to amend Section 154, of Title 41, of the 1940 Code of Alabama." Section 2 of the Act, however, provides "that all laws or parts of laws in conflict with the provisions of this Act are hereby modified so as to conform with the provisions hereof."

Manifestly the **title** gives no hint or intimation of intent to amend, or "modify" any Code section other than Section 154 of Title 41. If, on the other hand, full force and effect should be accorded to the second section of the Act it would operate to amend Tit. 13, § 240, by placing a variable maximum of $4.00 to $5.00, to be determined by the Governor by proclamation, instead of a fixed maximum allowance of $5.00, as provided in Section 240, for "subsistence" of solicitors engaged in performance of duty outside their circuits.

This brings the question within the influence of the doctrine of **State ex rel Lister v. Hawkins,** 229 Ala. 144, (155 So. 692), in which, on page 146, it was said:

> "In other words, the title to the act gave notice to the Legislature and the public that only Section 370 would be amended and did not give the slightest notice or hint that Section 371 would be changed or altered, and was, in fact, a delusion and snare as to a change in Section 371. We therefore hold that so much of the act as gives the chairman of the board of registrars a fixed term of four years, removable by impeachment only, was not within the purview of Section 370 and therefore not within the title to the act."

See also to the same effect: **Board of Revenue v. Jansen,** 224 Ala. 240, 139 So. 358; **State ex rel Troy v. Smith, Auditor,** 187 Ala. 411, 65 So. 942; **Wood v. McClure,** 209 Ala. 523, 96 So. 577; **Kendrick v. State,** 218 Ala. 277, 120 So. 142; **Ex Parte Cowert,** 92 Ala. 94, 9 So. 225; **Constitution** 1901, § 45.

I am of opinion that the Act of June 22, 1943, does not apply to circuit

solicitors and other solicitors whose traveling expenses and subsistence are limited by Code 1940, Tit. 13, § 240.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 24, 1943.

Hon. Eugene B. Henry,

Commissioner of Licenses,

Jefferson County,

Birmingham, Alabama.

Act No. 207, Senate No. 88, approved July 22, 1943, held unconstitutional.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of August 19, 1943, is as follows:

"I respectfully request an opinion as to the constitutionality of Senate Bill 88, amending section 613, Title 51, of the Code of Alabama. The licenses called for under this schedule are payable October 1st and several of the people affected contend that it violates section 70 of the Constitution."

It is my opinion that Act No. 207, Senate No. 88, approved July 22, 1943, is unconstitutional in that it violates Section 70 of the Constitution of 1901.

This Act has for its origin Act No. 398, House No. 827, approved Septemper 13, 1939, General Acts 1939, page 519. The title to this Act is as follows:

"To amend an Act entitled 'An Act to Amend Schedule 154 of Article XIII, Chapter 1, of Section 348 of an Act approved July 10, 1935, entitled "An Act to Provide for the General Revenue of the State of Alabama,"' approved February 2, 1937."

Act 207, supra, shows on its face it is an Act to provide for the general revenue of the State of Alabama. All such Acts must originate in the House.

True, this bill seeks to amend an existing Code section, but the right of the Senate to propose amendments to revenue bills applies to pending bills which originated in the House and not to such measures after they have been enacted.

It is, therefore, my opinion that said Act No. 207 is unconstitutional in that it violates Section 70 of the Constitution of 1901.

In re Opinion of the Justices, 238 Ala. 289, 190 So. 824;

Perry County v. Selma, Marion, Memphis Ry. Co. 58 Ala. 546;

In re Opinion of the Justices, 232 Ala. 95, 166 So. 807;

State ex rel. Franklin County v. Hester, 224 Ala. 460, 140 So. 477.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 24, 1943.

Hon. W. W. Lazenby,

Tax Assessor,

Lee County,

Opelika, Alabama.

Code 1940, Title 51, § 15—Taxation—Homestead Exemption—Persons in Military Service of United States.

1. Taxpayer absent in military service may claim homestead exemption by some authorized agent at any time on or before the third Monday in January.

2. If such taxpayer's homestead is on October 1, at the beginning of the tax year occupied in its entirety by another under lease for a definite term, without reservation by taxpayer of the right to occupy any part thereof, the exemption is not allowable.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of August 17, 1943, is as

follows:

> "We have quite a few men that have homes and were living in them until they were drafted into the service of the United States armed forces, in some cases the wife still occupies the home, in others they have rented the home.
>
> "I am desirous to know what I shall do in regard to the homestead exemption, this question will soon be coming up, will you please write me your opinion in regard to these cases."

A claim to homestead exemption under Code 1940, Title 51, § 15 must be asserted by the taxpayer or his duly authorized agent, on or before the third Monday in January of the tax year, by separate listing and valuation of the property claimed as exempt. Otherwise the exemption is waived. Opinion to Hon. Chas. W. Lee, State Comptroller, January 5, 1938 (**Quarterly Report of Attorney General,** Vol. X, p. 27).

The right is not lost by temporary absence of the exemptioner, if he intends subsequently to return and occupy the property as his homestead, even though he may have rented a part thereof to another person for occupancy. Likewise, the taxpayer's agent may in his behalf assert and claim the exemption. Opinion to Hon. John M. Graham, Tax Assessor, Jackson County, Sept. 20, 1937, (**Quarterly Report of Attorney General,** Vol. VIII, p. 269).

If, however, at the beginning of the tax year on October 1 the property sought to be exempt is in its entirety under lease to another for a definite fixed term, the exemption will not be allowed. Opinion to Hon. Henry S. Long, Chairman, State Tax Commission, Jan. 7, 1938, (**Biennial Report, Attorney General,** 1936-38, p. 508).

In the absence of proof to the contrary it may be presumed that persons now in the military service of the United States intend, upon termination of such service, to return to the homesteads they occupied prior to induction into the service.

For the benefit of such persons the Soldiers' and Sailors' Civil Relief Act of 1940 expressly provides procedure whereby the sale of "real property owned and occupied for dwelling, agricultural, or business purposes" by them or their dependents or employees, to satisfy unpaid taxes, may be avoided for a period not exceeding six months after termination of service. 50 U. S. C. A., §§ 501, 560. The act is, however, silent as to any procedure applicable to the present situation.

Nor do I find any statutory law of this state relevant to the situation.

In conclusion I suggest that you give publicity to the fact that in cases where the taxpayer is absent on account of military service the homestead exemption may be claimed by his authorized agent in his behalf at any time on or before the third Monday in January next. You are not yourself, of course, authorized by law to make the claim, and the right of exemption will

be lost or waived unless the claim is made in the manner above stated.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 27, 1943.

Hon. W. C. Harrison,

Associate Commissioner,

Alabama Public Service Commission,

Capitol.

Alabama Motor Carrier Act of 1939—Motor Carriers—Acts 1939, p. 1064, 1066, § 2—Public Service Commission—

Motor carrier operating wholly within corporate limits or police jurisdiction of city or incorporated town, and engaged also in interstate transportation of passengers for hire not subject to regulation by Alabama Public Service Commission—

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of August 19, 1943, is as follows:

"Columbus Transportation, a corporation organized under the laws of the State of Georgia, is engaged in furnishing passenger bus transportation service in Phenix City, Alabama, and between Phenix City, Alabama, and Columbus, Georgia. This Company has on file with this Commission a liability bond in the sum of ten thousand dollars. Prior to July 10, 1926, this Company operated an electric street railway system between and in the above named cities. A certificate of convenience and necessity was issued by this Commission to said company to operate a bus service for passengers on July 10, 1936, between these cities and it has so operated since that time, discontinuing its electric railway system on that date. This company filed with this Commission, on the 12th day of July, 1943, a petition alleging that the Company does not come under the jurisdiction of the Alabama Public Service Commission and requesting permission to discontinue the above liability bond.

"We wish your opinion as to whether or not this Company is subject to the jurisdiction of this Commission to the extent of requiring it to

file a liability bond for the protection of the public against its operation in the bus service as described above."

The question as I understand it is whether under the circumstances stated that the Commission is authorized by law to require the above named motor carrier to furnish security for protection of the public in the course of its operations.

Whatever authority the Commission may have in that respect must be derived from Section Sixteen of the "Alabama Motor Carrier Act of 1939," **General Acts,** 1939, pp. 1064, 1076, § 16.

That section of the Act, in my opinion, applies only to carriers operating under "certificates of public convenience and necessity" and permits referred to therein as certificates or permits, which the Commission is authorized to issue under Sections 8, 9 and 11 of the Act. In Section 16, it will be noted, that the bond or other security required of the carrier is "conditional to pay *** any final judgment recorded against such motor carrier *** resulting from the negligent operation, maintenance or use of motor vehicles under certificate or permit *** ."

Unless therefore the motor carrier is operating in this State under a certificate or permit issued by the Commission, and authorized by law to be issued by the Commission, it is difficult to see from what source its authority to require such bonds can be derived.

It further appears that this motor carrier's intrastate business is confined to the corporate limits or police jurisdiction of Phenix City, Alabama, an incorporated city or town, and is therefore expressly exempted from the operation of the Motor Carrier Act, Gen. Acts, 1939, pp. 1064, 1066, § 2, A2.

It is true that in Section Four (p. 1067) of the Act, there is a vague declaration that it shall apply to interstate commerce except as conflicting with the federal constitution or Acts of Congress, but that declaration, in my opinion, adds nothing to the discussion, nor serves in any way to answer your question in view of the express provisions of the statute above referred to.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 27, 1943.

Hon. Ben C. Morgan,

Acting Director of Conservation,

Capitol.

Revenue derived from the lease of beds of navigable waters in Alabama should be deposited in the State Treasury to the credit of the general fund.

The Governor is the authorized State official to enter into and execute, on behalf of the State, leases of the beds of navigable waters in Alabama.

Opinion by Assistant Attorney General Savage.

Dear Sir:

Your request for an official opinion bearing date of July 13, 1943, is as follows:

"As you are perhaps aware there has been renewed interest in the leasing of the beds of navigable streams and the coastal water areas of Alabama. The Governor has referred these matters to this office, and in recent weeks this Department advertised the bed of the Alabama River for leasing. This was done under the supervision of your office.

"The question arises in my mind as to the disposition of the revenue derived from the leasing of the beds of navigable streams and coastal waters of Alabama. It is requested that you render an official opinion as to the handling of this lease, and other leases which may be made, with particular reference as to the proper agency of State Government to enter into these leases, as well as to the deposit of funds derived from these leases in the State Treasury."

The Legislature, which met in May 1943 amended Section 55 of Title 47 of Code of Alabama of 1940, which section as amended reads as follows:

"Section 55. LEASES, ETC., BY STATE AGENCIES.—(a) All leases, contracts of exchange, or other dispositions of real estate for more than one year made by any department, commission, or other agency of the State of Alabama, shall be invalid and void unless approved in writing by the Governor on the face thereof. (b) The Governor, on behalf of the State, is hereby authorized to lease, upon such terms as he may approve, any lands or interest therein owned by the State, including lands or any right or interest therein in or under any navigable stream or navigable waters, bays, estuaries, lagoons, bayous or lakes, and the shores along any navigable waters to ordinary high tide mark, and lands under navigable waters within the three mile limit from the shore line of any county or counties in Alabama, for the purpose of exploring for, and mining or producing oil, gas, and other minerals upon or from such lands."

It appears that under the above section of the Code the Governor is the authorized State official to enter into and execute such leases on behalf of the State.

With reference to the disposition of any revenue derived from such leases it is my opinion that, since title to the beds of navigable streams in the State is vested in the State in trust for public purposes, subject to the right of the Federal Government to regulate navigation and foreign and interstate commerce (see Quarterly Report of Attorney General, Volume XXXI, Page 74) and since there is no provision of law, so far as I am aware, appropriating revenue derived from such source to any particular purpose, it should be deposited in the State Treasury to the credit of the general fund of the State.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 27, 1943.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Capitol.

Sheriffs—Costs and Fees—Justice of the Peace Courts—State Comptroller—

1. The fees of a sheriff for services rendered in a justice of the peace court in a felony case in which the defendant is sentenced to the penitentiary are not chargeable to the State under Section 69, of Title 45, Code of 1940, as if such fees had accrued for services rendered in the circuit court. Such fees must be charged on the bill to the State as part of the fees for the committing magistrate and constable.

2. Fees for continuances in justice of the peace courts are not chargeable to the State as part of the cost for the committing magistrate and constable.

3. The above rules are applicable to the Jefferson County Court of Misdemeanors.

4. The State Comptroller is liable to the State for amount of any warrant drawn upon the State Treasury in payment of a claim which shows upon its face that it is illegal.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1943, is as follows:

"I am enclosing copy of cost bill paid by the State in the case of the State v. Louis Buckner, Case No. 78612, Jefferson County, Alabama. The cost bill was made out and sworn to by the Clerk of the Circuit Court of Jefferson County, later examined and approved for payment by the Department of Corrections and Institutions, and thereafter sent to the State Comptroller, who issued a warrant in payment of the same.

"The records in the Jefferson County Court of Misdemeanors show that a warrant was issued and made returnable to said court, charging the defendant with a felony; that it was served by the Sheriff of Jefferson County, along with subpoenas for six State witnesses; that the defendant was arrested, committed to jail, and bound over to the grand jury at the preliminary hearing in the Jefferson County Court of Misdemeanors. That the amount of the Sheriff's cost for services in said court was eight dollars, and that instead of charging said sum as part of the cost in the inferior court, it is charged in the cost bill from the Circuit Court as fees for services in the Circuit Court. The defendant was later tried in the Circuit Court, convicted and turned over to the State to serve a term in the penitentiary.

"The cost bill also shows that three continuances were granted in the Court of Misdemeanors, and a fee charged for each continuance.

"Based on the above statement of fact I wish your official opinion upon the following questions:

"1. Are the fees of the Sheriff for services in the Jefferson County Court of Misdemeanors chargeable on the cost bill of the Circuit Court to the State as if such services had been performed in the Circuit Court or should such fees be charged as part of the cost for the committing magistrate and constable?

"2. Are fees for continuances in the Jefferson County Court of Misdemeanors chargeable to the State under Title 45, Section 69, Code of 1940, as part of the cost for the committing magistrate and constable?

"3. If your answer to the above questions is in the negative, it appears that the State has paid out too much money on the cost bill. If such is true, I wish to be advised as to who is legally liable for such overpayment."

Attached to your inquiry is a copy of a cost bill made and sworn to by the Clerk of the Circuit Court of Jefferson County, in the case of **State v. Louis Buckner,** which was submitted to the proper State officials, approved for payment, and a warrant issued upon the State Treasury for the payment thereof. Due to the intricate setup and design of this cost bill I cannot incorporate it in this opinion but will refer to it from time to time as is nec-

essary. In addition, I shall not consider any facts not apparent upon the face of the same insofar as it might affect or concern State officials. Likewise, I cannot consider facts shown upon the records of the Jefferson County Court of Misdemeanors as affecting a State official unless something is shown upon the face of the cost bill calling attention to such fact.

The Jefferson County Court of Misdemeanors is, especially for the purposes herein under consideration, an inferior court with the same jurisdiction and powers as justice of the peace courts. Act No. 323, Local Act, 1919, page 121.

Under the general law sheriffs may serve process from the justice of the peace courts and under the provisions of many local acts creating inferior courts in lieu of justice of the peace courts sheriffs are required to perform such services. This is true with the Jefferson County Court of Misdemeanors. See Section 15 of the local act, supra, creating said court. For such services in criminal cases a sheriff is allowed the same fees as allowed him for like services performed in circuit courts instead of the fees allowed constables in justice of the peace courts. See **Trapp v. State,** 122 Ala. 394, 25 So. 194. In other words, a sheriff when performing the duties of a constable is entitled to the fees allowed sheriffs for such services instead of those allowed constables for similar services. Even though sheriffs are allowed such fees the question often arises as to how such fees may be collected. If a defendant is convicted and is given a fine and costs, and pays the same, the question becomes moot. If, however, the defendant in a justice of the peace court is acquitted, or found insolvent after conviction there is no fund from which a sheriff may collect his fees. The couny fine and forfeiture fund is not liable for the payment of such fees. **Quarterly Report of Attorney General,** Volume XXVIII, page 135; **Quarterly Report of Attorney General,** Volume XIV, page 66, **Biennial Report of Attorney General** 1926-28, page 702. Neither can such fees be paid from the insolvent cost fund of the justice of the peace. **Quarterly Report of Attorney General,** Volume XVII, page 78. This general rule or regulating the allowance and collection of sheriff's fees is not applicable. to courts created in lieu of justice of the peace courts if a different provision is made for the same. So far as I am able to find the general rule regulating the allowance and collection of sheriff's fees applies to such fees accruing in the Jefferson County Court of Misdemeanors. With these observations in mind, I shall proceed to answer your inquiry.

In my opinion, your first inquiry must be answered in the negative.

The cost bill in question shows upon its face that:

1. The defendant was tried in the circuit court of Jefferson County for the offense of robbery and given a sentence of five years in the penitentiary.

2. That the defendant was given a preliminary hearing in the Jefferson County Court of Misdemeanors, at which time six witnesses appeared for the State, all of whom had been served by the sheriff.

3. That four witnesses appeared before the grand jury for the State and five at the trial in the circuit court.

4. That the sheriff made a charge of $7.50 for serving these fifteen subpoenas, nine of which had been issued by the Clerk of the Circuit Court of Jefferson County and the other six in the Jefferson County Court of Misdemeanors.

5. That the sheriff executed a warrant of arrest for which he charged a fee of $4.00 and a further fee of $1.00 for committing the prisoner to jail, making a total of $12.50 for sheriff's fees and that no part of these fees are charged on the bill to the State as part of the cost of the committing magistrate and constable.

From these facts which are apparent upon the face of the cost bill, I think it may reasonably be presumed that:

1. A warrant was sworn out in the Jefferson County Court of Misdemeanors, charging the defendant with the commission of a felony, and that the same was served by the sheriff for which he made a charge of $4.00.

2. That subpoenas for six State witnesses were served by the sheriff for attendance at the preliminary hearing, and a fee of $3.00 was made by the sheriff for such service.

3. That at the preliminary hearing the defendant was bound over to the grand jury and committed to jail by the sheriff, for which a fee of $1.00 was made.

From these facts and deductions it appears that fees of the sheriff amounting to $8.00 accrued in the Jefferson County Court of Misdemeanors, and should have been charged on the cost bill to the State as part of the fees accruing for the committing magistrate and constable. It also appears that other fees accrued in said court amounting to $3.25, making a grand total of $11.25. Under provisions of Section 69, Title 45, Code of 1940, only $5.00 is payable by the State for costs of the committing magistrate and constable on preliminary hearings. If the defendant had been discharged at the preliminary hearing, there would not have been any fund available for the payment of the fees of the sheriff. It thus appears that the State has made an overpayment in the sum of $6.25.

It is my opinion that your second inquiry should also be answered in the negative.

Section 69, of Title 45, supra, enumerates the various items of costs which are payable by the State, and nowhere is there found a fee for continuances. It does place a limit of $5.00 on the amount to be paid committing magistrates and constables. By virtue of this limitation it might be argued that any items of costs could be charged providing the total did not exceed $5.00. I can not agree with this reasoning since Section 70 of the same title places a limitation of $250.00 on the amount to be paid in any one case. In other words, a circuit clerk could not charge a fee for continuances even though the total costs in the case did not exceed $250.00. Payment of costs by the State is a mere boon granted by the Legislature and no items can be included except those specifically provided in said section. **Biennial Report of Attorney General,** 1918-20, page 307; **Biennial Report of Attorney General,** 1920-22, page

348; **Biennial Report of Attorney General, 1932-34,** page 165.

From the foregoing it appears that a State warrant was issued for at least $6.25 more than was due in the payment of this cost bill.

Section 72, of Title 45, Code of 1940, reads as follows:

> "§ 72. **Clerk must swear to bill of costs; limit; how paid.**—After such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items not enumerated in the preceding sections; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant; he shall forward the bill of costs to the directors, who shall carefully examine the same, and if found correct, he shall request the comptroller in writing to draw his warrant upon the treasurer for the payment of said bill to said clerk out of the convict fund. No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials."

Under this section, the clerk of the court in which the conviction is had is required to make out an itemized sworn statement of the costs properly chargeable to the State, and forward the same to the Director of the Department of Corrections and Institutions. Upon receipt of the same, the Director is required to carefully examine it, and if found correct, and the convict has been delivered to the State penitentiary, to forward it to the State Comptroller requesting him in writing to draw his warrant upon the State Treasury in favor of the clerk in payment of said bill out of the convict fund.

The duties and functions of the State Comptroller are set out in Section 81, of Title 55, Code of 1940, the part pertinent to the question here involved reading as follows:

> "To pre-audit and determine the correctness and legality of every claim and account submitted for the issuance of a warrant and to determine that funds have been appropriated and allotted and are then available in the state treasury for the payment of such claim or account before any warrant on the state treasury shall be issued."

Under provisions of this section of the Code it clearly appears that it is incumbent upon the Comptroller to determine the **correctness** and **legality** of all claims before issuing a warrant upon the State Treasury in payment of the same. It is my opinion the cost bill in question showed upon its face that the State was only liable for $29.00, and that the amount in excess thereof, for which the warrant was drawn, is properly chargeable to the Comptroller since it was his duty to determine the correctness and legality of each **item in the cost bill** before issuing a warrant.

The liability of a State Comptroller in drawing warrants upon the State Treasury is closely analogous to that of county officials, acting under Section 51, Title 12, Code of 1940, in drawing warrants upon a county depository or treasury. This office has consistently held that a county official, signing

county warrants in payment of an illegal claim is liable for the amount thereof, even though such claim has been audited and allowed by the county governing body. **Quarterly Report of Attorney General,** Volume XIV, page 80; **Quarterly Report of Attorney General,** Volume XX, page 235.

Premises considered, I am of the opinion that:

1. The fees of a sheriff for services rendered in a justice of the peace court in a felony case, in which the defendant is held over for the grand jury, later indicted and tried in the circuit court, and thereafter sent to the State penitentiary are not chargeable to the State under Section 69, Title 45, Code of 1940, as if such fees had accrued for services performed in the circuit court. Such fees must be charged on the cost bill as part of the fees for the committing magistrate and constable.

2. Fees for continuances in justice of the peace courts are not chargeable to the State as part of the costs for the committing magistrate and constable.

3. The State Comptroller is primarily liable to the State for the amount of any warrant drawn from the State Treasury in payment of a claim which shows upon its face that it is illegal or for that part of the warrant which covers illegal items in the claim.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 1, 1943.

Hon. E. B. Norton,
Superintendent of Education,
Capitol.

LOCAL ACT, CULLMAN COUNTY NO. 56, ACTS LEGISLATURE 1943—LEVY PRIVILEGE TAX ON GASOLINE, ETC.—

1. The Local Act of 1943 authorizes the Road and Bridge Commissioner of Cullman County to levy a privilege tax on gasoline, etc. but does not apply to the County Board of Education in the operation of school buses.

2. By the general language used in the Act it is clear that there was no intention to place a burden or a liability upon the sovereignty, its subdivisions or governmental agencies.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of August 11, 1943 is as follows:

"The Cullman County Board of Education owns and operates a large fleet of county-owned buses. The Board purchases large quantities of gasoline for the operation of this fleet in transporting children to the public schools in Cullman County. Act No. 56 approved May 28, 1943, authorizes the Road and Bridge Commissioner of Cullman County, Alabama to levy and collect a privilege tax of one cent per gallon on motor fuels used in self-propelled vehicles. On June 21, 1943, the Road and Bridge Commissioner of Cullman County levied this tax. A copy of the act and the resolution pertaining to this matter is appended to this letter. Your opinion is requested on the following questions:

"1. Is the Cullman County Board of Education required to pay this privilege tax on gasoline purchased from distributors in Cullman County, which gasoline is used for the operation of buses owned and operated by the County Board of Education for the transportation of children to and from school?

"2. Is the Cullman County Board of Education required to pay this tax if it purchases its gasoline directly from refineries located outside the County of Cullman, which gasoline is used exclusively by the Cullman County Board of Education for the operation of county-owned school buses used in transporting children to and from school?

The title to the act under review purports to authorize the road and Bridge Commissioner to levy and collect privilege tax on all persons, corporations, etc., engaged in selling, delivering, withdrawing from storage or keeping in storage for sale or delivery gasoline, naphtha, etc. While the

Act, Section 1, vests said Commissioner with authority to levy and collect a privilege of not more than one cent per gallon on gasoline, etc, nothing in the Act itself shows any purpose to levy on persons, corporations, etc. a privilege license tax, but a mere flat levy on gasoline is made. However, we may put aside these matters and any question of the validity of the Act, or any part thereof. Whatever may have been the purpose of the Legislature, there certainly nowhere appears in the Act itself any purpose or intention on the part of the Legislature to fasten any burden or liability upon the sovereign State, its subdivisions or governmental agencies. It is a settled rule of statutory construction that without any express legislative declaration in an enactment general words in the statute do not apply to the State, its subdivisions or governmental agencies and the enactment has no effect upon the rights and privileges of such agencies unless an intention to the contrary clearly appears from the language of the legislative enactment. **Smith v. McCord,** 203 Ala. 347, 83 So. 71; **Ex Parte Loveman, Joseph and Loeb,** 241 Ala. 379, 2 So. 2d 446. This principal was directly recognized by our legislature in the gasoline act of 1935, now in our Code as Title 51. See Section 646 of this title.

From the foregoing it is apparent that the local act for Cullman County does not affect Cullman County Board of Education in the operation of school buses with gasoline.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 1, 1943.

Mr. T. C. Garner,

Treasurer, Jefferson County,

Birmingham, Alabama.

Jefferson County Commission cannot create position of Bailiff-Secretary or Bailiff-Stenographer with increased remuneration over other bailiffs who are required to perform the same grade and class of service.

Jefferson County Commission cannot buy typewriters for the Circuit Judges of the Tenth Judicial Circuit.

Neither state nor county may purchase stationery and stamps for the Judges of the Tenth Judicial Circuit.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of August 20, 1943, is as follows:

"Please give me your opinion on the following questions:

"1st—Can the Jefferson County Commission legally create a position of bailiff-secretary or bailiff-stenographer, for the Circuit Judges of the 10th Judicial Circuit, with increased pay over other bailiffs under House Bill 337 enacted in 1943?

"2nd—If this position can be created by the commission what effect will house bill No. 838 have on this position, which reads in part, that it authorizes a secretary to all elected officials of Jefferson County except Judges?

"3rd—Can the County Commission legally buy typewriters for the Circuit Judges of the 10th Judicial Circuit?

"4th—Should the State or County purchase stationery and stamps for the judges of the 10th Judicial Circuit?"

In my opinion your first inquiry should be answered in the negative. Title 12, Section 133, et seq., authorizing the creation of the Civil Service System in Jefferson County, gives the Jefferson County Commission broad and sweeping powers. Among other things, it provides that the Commission may establish, grade and classify positions, establish a minimum, one or more intermediary, and a maximum salary for each position; it may establish certain minimum qualifications and abilities for each position, grade or within grade rating, and no doubt can, within its authority, demand the ability

to act as a secretary or stenographer as a prerequisite for such rating.

Your inquiry is directed to House Bill No. 838, 1943 Legislature, which deals with the disposal of municipal property in Calhoun County. However, House Bill No. 832, 1943 Legislature, deals with the Civil Service System in Jefferson County, so we will consider your inquiry directed to the latter act, which reads pertinently as follows:

> "Section 144. Duties of Personnel Director. The director of personnel, subject to the provisions of this chapter and approval of the personnel board, shall: *** Classify or direct the classification of all positions of this chapter and in accordance with the duties attached to such positions. Grade and classify all positions in the county and for each appointing authority with respect to salary to the end that **each employee shall receive the same compensation as all other employees of the said county or city receive for the same grade and class of service.** *** " (Underscoring supplied)

House Bill No. 337, 1943 Legislature, reads pertinently as follows:

> "In the event a judge of the Circuit Court of Jefferson County, Alabama (Tenth Judicial Circuit) so requires, a bailiff or bailiffs heretofore or hereafter appointed by him may be required to perform clerical, stenographic or secretarial work in addition to other work."

It must be noted that any judge may direct a bailiff to perform clerical, stenographic, or secretarial work, and in the event a position of bailiff-secretary or bailiff-stenographer was created, permitting remuneration higher than allowed other bailiffs, a situation would exist where one employee would receive greater compensation than others for the same grade and class of service. This the Commission cannot do.

It is also my opinion that the County Commission cannot buy typewriters for the Circuit Judges of the Tenth Judicial Circuit. In Underwood Typewriter Company v. Marengo County Bank, 209 Ala. 128, 82 So. 158, it was held that the term "stationery" included typewriters. This office has held that a county could not purchase typewriters or stationery for the Circuit Judges. See Quarterly Reports of the Attorney General, Vol. XVI, page 261 and Vol. XVII, page 306, the former in reference to typewriters and the latter to stationery.

It is my further opinion that neither the county nor state may purchase stationery or stamps for the Circuit Judges of the Tenth Judicial Circuit. I have conducted a diligent search through the local acts and the statutes and am unable to find any authority whereby a county or the state is authorized to purchase either item for the Judges of the Tenth Judicial Circuit.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 2, 1943.

Hon. J. H. Dobbins,

Clerk and Register,

Calhoun County,

Anniston, Alabama.

Under Local Act Extra Session 1937, page 14, which Act provides for a fund to be known as the Law Library Fund of Calhoun County and provides for its disbursement by the Clerk, the Clerk is not entitled to any commission for disbursing said fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of August 26, 1943, is as follows:

"I would like to have information on the following question.

"Local Act approved January 26, 1937, provided for the creation of a fund for the support of a law library for the Circuit Court of Calhoun County by imposition of a tax of $1.00 and $2.00 according to the amount of the litigation involved, such taxes to be collected and received by the Clerk of the Circuit Court and held by him in separate fund and paid out on order of the Court.

"Would I be entitled to deduct 5% commission for remittance the same as in trial tax, etc., paid to State and County.

"I do not receive any fees for handling this fund."

My answer to the above is in the negative. In passing on a matter of this character it must be remembered that the law of costs must be deemed and held penal, and no fees must be taken but in cases expressly provided by law. See Title 11, Section 79, Code of 1940. Statutes of this character must be strictly construed.

Lee v. Smiley, 16 Ala. 773

Dent v. The State, 42 Ala. 514

Greene County v. Hale County, 61 Ala. 72

Troup v. Morgan County, 109 Ala. 162, 19 So. 503.

The Act to which you refer is found in General and Local Acts Extra Session 1937, page 14, approved January 14, 1937, which Act provides:

" *** a Fund for the support of a Law Library for the Circuit Court of Calhoun County, Alabama, without appropriation from the State or County Treasury by the assessment and collection of court cost in all suits, actions and proceedings hereafter filed or brought to said court, and provide for the regulation and control of said fund."

The Act nowhere provides that the Clerk of the Circuit Court shall receive any fee or commission for disbursing this fund which must be disbursed on the order of the court, and certainly there is no general law or statute that provides such an allowance or commission for the reason such fund is never paid to the State or County Treasury.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 7, 1943.

Hon. Hugh W. Brown, President,

Jefferson County Jury Board,

311 Court House,

Birmingham, Alabama.

Jefferson County—Local Acts 1932, Ex. Session, pp. 98, 101 § 14—Code 1940, Tit. 30, § 21, as amended by Act No. 325, H. 231, approved July 1, 1943—Juries and Jurors—

Persons over the age of sixty-five years in Jefferson County are no longer ineligible on account of age to serve as jurors, but may, if unwilling, refuse to serve as jurors.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 21, 1943, is as follows:

"The recent Legislature passed an Act amending Section 21 of Title 30 of the 1940 Code. Said Act identified as House Bill No. 231, Governor's No. 325. This bill apparently removed generally the disqualification of a person to be a juror by reason of his being over the age of 65 years.

"This County is operating its jury system in compliance with a local act appearing in the Local Acts of 1932. This act disqualifies a person

for jury service over the age of 65.

"I will appreciate an official expression from you on whether or not the general act as amended H231, Governor's No. 325, repeals that part of the Jefferson County Jury Law appearing in the 1932 local acts pertaining to the age of jurors.

"I understand a number of Alabama Supreme Court decisions upon this point appear in the West Publishing Company's Alabama Digest under Key No. 162 of the title 'Statutes.'"

From earliest times in Alabama (Toulmin's Dig. page 496, Territorial Act of February 11, 1807) until enactment of Act No. 227, H. 128, approved August 31, 1909, (Acts 1909, pages 305, 309, Section 11) persons over the age of sixty were disqualified to act as jurors. By the latter act this disqualification was removed and the limit raised to sixty-five years, and persons over that age were disqualified.

Local Act No. 247, H. 512, approved November 9, 1932 (Local Acts 1932, Extra Session, page 98) established a jury board in Jefferson County, and in Section 14 of the Act it was provided, in substance and effect, that the Board should place on the jury roll and in the jury box the names of all persons then qualified for jury duty under the general law. Said section 14 is virtually a copy of Section 11 of the Act of August 31, 1909, which was carried into the Code of 1923 without change as Section 8603.

Code 1940, Title 30, Section 21 was brought forward from the Code of 1923 without change and is now amended by Act No. 325, H. 231, approved July 1, 1943, removing the disqualifications of persons over the age of sixty-five and providing that they may elect to serve as jurors but that such service is not compulsory.

The question arises whether the amendatory act of July 1, 1943, operates to amend or change in any way the provision of Section 14 of the Local Act of 1932, disqualifying persons over the age of sixty-five.

This question is not without difficulty. It possibly might be answered either way and plausible reasons and citation of authorities made in support of whichever view was advanced.

It has often been held that specific provisions of a special or local law are not amended or repealed by subsequent general legislation on the same subject conflicting therewith, in the absence of a clear legislative intent to that effect. See cases cited in Alabama Digest, Statutes, Section 162.

There are, however, apparent exceptions to this general rule of construction arising from the legislative history and nature of the subject matter legislated upon.

Thus in **Shepherd v. Clements,** 224 Ala. 1, 141 So. 255 (1931) it was held that although under a local act relating to courts of record in Jefferson County (Acts 1888-89, p. 800, § 7) it might be necessary to except to the find-

ings and final judgment of the Circuit Court in that county upon a trial without jury in order to review the judgment on appeal, yet by reason of subsequent legislative revision of court procedure throughout the State, apparently intended to provide statewide uniformity, it was no longer necessary to except to such judgments in said county in order to review them on appeal.

Said the Court:

"We recognize the rule that the presumption is a general act does not repeal a local statute, but as has been well said, 'Such presumption must give way to a plain manifestation of a different legislative intent.' The question is one of **intention which may be made to appear by the subject-matter with which the general act is concerned,** by the surrounding circumstances, by other legislation on the same subject, and **the purpose to be accomplished.** Thus, where the clear general intent of the Legislature is to establish a uniform system throughout the State, the presumption must be that local acts are intended to be repealed. 36 Cyc. 1089, 1090.

"As applicable to the present question, another rule of construction should not be ignored, and that is that statutes should have a rational, sensible construction, if their meaning is at all doubtful. 25 R. C. L., page 1018.

"It would seem unreasonable that the lawmakers should require the reservation of an exception to review the judgment of a court in one county and should permit such review in another county without such exception. We can see no basis in reason or common sense for such a distinction. But we think it clear the above noted legislative acts evidenced the intent of the lawmakers that they should be applicable throughout the State, and that the practice of review of such judgments should be uniform as to all such courts."

So in the present instances under general law and the local act alike persons over the age of sixty-five years were not qualified jurors. Until the recent amendment the qualifications, under the general law and the local act, were the same in Jefferson and all other counties throughout the State.

No good reason is percieved why a distinction should be drawn as to the qualification of jurors between Jefferson County and other counties of the State. Any such distinction would be arbitrary, unreasonable and without basis.

Whoever is a competent juror in one county, with respect to age, should likewise be competent in an adjoining county or any other county of the State. Competency or qualification for jury duty in the very nature of things should be a matter of uniformity throughout the State, and should be statewide—as much so, as matters of practice in courts of record.

I cannot escape the conclusion, based on the nature of the subject matter legislated upon and legislative history above, that in making the recent amendment the legislature intended it to apply uniformly throughout the State, although there is no express provision to that effect in the act itself.

And so I am of opinion that Section 14 of the local act of 1932 has, by necessary implication, been superseded, or in effect amended, to the extent that persons over the age of sixty-five are no longer disqualified for jury duty in Jefferson County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 7, 1943

Hon. Roy C. Oliver,

Judge of Probate,

Tallapoosa County,

Dadeville, Alabama.

Tallapoosa County—Circuit Clerks—Ex Officio Fees—Act No. 224, H. 10, Acts of Alabama 1943.

Local Acts providing for duties, authority, and compensation of a deputy clerk to maintain the office of Clerk and Register at Alexander City, precludes the Circuit Clerk from that portion of Oct No. 224, H. 10, Acts of Alabama 1943, providing for the payment of $600.00 per annum, in addition to other Ex Officio fees, to circuit clerks of counties in which the Circuit Court is held at two places.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of July 12, 1943, is as follows:

"The Court of County Commissioners of Tallapoosa County have requested me to secure an opinion as to the application to Tallapoosa County of House Bill Ten by Mr. Carnley amending Section 24 of Title 11, of the Code of Alabama 1940, approved by the Governor June 22, 1943. Is there anything in the Local Act of the Legislature, Local Acts of 1923, page 229, enlarging the jurisdiction of the Circuit Court of Tallapoosa County at Alexander City which prohibits our Court of County Commissioners from allowing the Clerk of the Circuit Court of Tallapoosa County ex officio fees of $600.00 per annum in addition to the amount otherwise provided by House Bill Ten? For your information Circuit Courts are held at Dadeville and Alexander City in Tallapoosa County. In view of the Local Act referred to or any other statute of the State kindly advise if the Court of County Commissioners of Tallapoosa County,

Alabama is authorized to allow the Clerk of the Circuit Court of Tallapoosa County, Alabama ex-officio fees of $600.00 per annum in addition to the amount otherwise provided by House Bill Ten."

Act No. 224, H. 10, Local Acts of Alabama 1943, the statute to which you refer, in addition to designating specific sums which each county governing body shall pay to the circuit clerk as ex officio fees, provides in part as follows:

" *** . In counties in which the circuit court is held in two places and where the clerks keep the records and an open office at each place at least two days each week, courts of county commissioners or boards of revenue of such counties must allow ex-officio fees of $600.00 per annum in addition to the amount hereinabove provided. *** "

Manifestly the $600.00 per annum provided for in the above quoted portion of the statute is applicable only where the Circuit Court is held at two places in the county and is in addition to other ex officio fees provided for in said statute. Your inquiry presents for consideration the question of whether the Court of County Commissioners of Tallapoosa County shall allow to the Clerk of the Circuit Court of Tallapoosa County this additional sum of $600.00 per annum.

Your question is answered in the negative.

Your attention is again directed to the above quoted portion of the statute in question, which predicates payment of the $600.00 per annum upon the condition that the clerk keep the records and an open office at each of the two places in the county at least two days a week. It is apparent that this additional payment of ex officio fees is designated to alleviate and compensate for the extra burden imposed upon such clerks to maintain two offices. This is in keeping with the decisions of the Alabama Supreme Court that the payment of ex officio fees contemplates the performance of ex officio duties.

It appears that the Clerk of the Circuit Court of Tallapoosa County does not come within the prescribed conditions upon which payment of the $600.00 per annum is predicated. An Act of the Legislature of Alabama, Acts of 1889, page 435, did impose upon the said clerk the additional duty of maintaining two offices within Tallapoosa County, but as evidenced by Acts of Alabama 1896-97, page 896, the Legislature relieved the said clerk of such additional duties by providing for the appointment of a deputy clerk to maintain the office, and keep the dockets, records and papers of the court at Alexander City, his compensation to be fixed by the Court of County Commissioners of Tallapoosa County and paid from the county treasury. Again in 1923, Local Acts of Alabama 1923, page 229, the Legislature indicated its intention to place all the duties of the court at Alexander City upon the deputy clerk by authorizing him to perform all the duties of Register concerning the said court when sitting in equity, and allowing him additional compensation of $600.00 per annum to be paid from the county treasury.

Thus, by legislative enactment the circuit clerk of Tallapoosa County has been relieved of all duties pertaining to the court held at Alexander City by provisions for the appointment, complete authority, and compensation of a deputy clerk at such place. The circuit

clerk does not have the duty to keep the records and open office at least two days a week at Alexander City, but his duties are confined to the maintenance of the office at Dadeville, the county seat of Tallapoosa County. Therefore, it is my opinion that the circuit clerk of said county does not come within the contemplation of that portion of the statute in question allowing the additional $600.00 per annum in counties in which the circuit court is held in two places.

Furthermore, any contention that the said Act No. 224 repeals or supersedes the above cited local acts pertaining to Tallapoosa County is without merit. It is a well known canon of statutory construction that a general statute does not repeal by implication an earlier local statute. Therefore, those statutory provisions for the appointment and compensation of a deputy clerk of Tallapoosa County, granting him complete authority over the maintenance of the office at Alexander City, prevail over said Act No. 224 and preclude the payment of the $600.00 per annum to the Circuit Clerk of Tallapoosa County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 7, 1943.

Hon. I. J. Browder,

Director,

State Personnel Department,

Capitol.

Act No. 80, H. 85, approved May 28, 1943—State Defense Council—Code 1940, Tit. 55, § 308, as amended—Act No. 348, H. 723, approved June 30, 1943,—Limited Tenure Appointments—

State employees under Act No. 80, H. 85, approved May 28, 1943, not within the classified service established by Code 1940, Tit. 55, § 301, nor subject to the Merit System Act as amended by Act No. 348, H. 723, approved June 30, 1943, until proclamation by the Governor of the existence of emergency authorizing limited tenure appointments to be made pursuant to said Act.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 24, 1943, is as follows:

"I shall appreciate your opinion, at your earliest convenience, on the following questions:

"1. Shall the employees of the State Defense Council, provided for in General Act No. 80, recently passed by the Legislature, be immediately considered subject to the provisions of the Merit System Act?

"2. Assuming that your answer to question number one is in the affirmative, shall the employees who have been in the employ of the Council but in the exempt service, be brought under the provisions of the Merit System Act in the same manner as 'incumbents' were covered originally on the effective date of the Merit System Act, or shall all jobs be considered open for original appointments to be made?

"3. Does the last sentence in Section 6 of the Act mean that all appointments are to be 'limited tenure' appointments, since reference is made specifically to that type of appointment?

"4. Does the section referred to above authorize the Director of the Defense Council to fix compensation, **without regard to the pay plan approved** by the **State Personnel Board,** or should the Board be required to approve the salary schedule?

"5. Assuming that your answers to the foregoing questions indicate that these employees are subject to the Merit System only in a limited way, are they subject to rules governing hours of work, annual and sick leave, political activities, and service rating?"

Act No. 80, H. 85, approved May 28, 1943, creates "a temporary department of the State of Alabama to be known as the State Defense Council." The temporary or transient nature of the department and its activities is further emphasized in Section 21 of the Act as follows:

"An emergency exists and this act shall take effect immediately upon its passage, and shall remain in effect until May 20, 1945, or until the termination of the existing war by the signing of a definitive treaty of peace, whichever shall first occur."

The council is expressly authorized, among other things, "to prescribe rules and regulations and control, activities to the extent relating to the war effort in connection with the following: Control of traffic and transportation, conservation of transportation facilities, salvage or prevention of waste of strategic materials, agriculture, fuel, conservation of natural resources, safety, employment, training and supply of labor, health and medical care, sanitation, nutrition, housing, rehabilitation, welfare, and education." In addition to the foregoing it may "cooperate" with federal and state departments, agencies, officers and employees, "charged with responsibilities relating to the war effort or defense of the Nation *** in matters pertaining to the war and common defense of the State and Nation."

Specifically it is charged with the duty of carrying out "precautionary measures against air raids and other forms of attack, including black-outs, dim-outs, radio silences, and any such other measures as will suppress any activities which may assist an enemy."

The Council is also authorized "to adopt, promulgate, and make effective plans, rules, regulations, and orders with respect to any matters deemed by the Council essential to the War effort." Such orders, rules, and regulations "shall have the full force and effect of law," and for violations thereof penalties may be imposed not to exceed $100 and six months' imprisonment or hard labor. Sections 5(j), 13, 17.

By Section 5(f) the Council is authorized to "provide for the recruitment, qualifications, training, equipment, powers and duties of all persons engaged in civilian activities, **subject so far as State officers, employees and agents are concerned to the Merit System Act as amended to provide for limited tenure appointments.**" (Emphasis added.)

Under Section 6 the State Director of Civilian Defense may "with the approval of the Council and subject to the Merit System Act as amended to provide for limited tenure appointments" employ various assistants, prescribe their duties and fix their compensation.

The only reference to the Merit System throughout the entire Act is in Sections 5 and 6 and it will be noted and should be emphasized that such reference is not to the Merit System Act as it existed when the Civilian Defense Act became law, on May 28, 1943, but the reference in each case is to the "Merit System Act as amended to provide for limited tenure appointments." When the Defense Act became law the Merit System Act (Code 1940, Title 55, Sections 293-372) had not been amended in any respect whatsoever, either to provide limited tenure appointments or otherwise, and at that time it was impossible to know with any degree of certainty what the contents of an amendment would be or the scope and meaning of limited tenure appointments. There was no such amendment until June 30, 1943, when Act No. 348 H. 723 was approved, entitled "To amend Section 308, Title 55, of the Code of Alabama of 1940."

Thus it will be seen that reference in the Defense Council Act to a supposedly amended Merit System Act was altogether inept and unavailing because, forsooth, no amended Merit System Act was in existence at the time.

This leads to consideration of the question, whether employees of the State Defense Council are within the classified service set up by the Merit System Act (Code 1940, Title 55, Section 301), which includes "officers and positions in the state service" other than those referred to as exempt and unclassified. Ordinarily it would, at first blush, seem that such employees would be within the provisions of said Section 301.

The unamended Merit System Act, however, can hardly have been intended to cover State employees of the transient character authorized by the Defense Council Act. As already indicated that Act will expire May 20, 1945, and may, we hope, terminate much sooner by "the signing of a definitive treaty of peace whichever shall first occur." On the other hand, the original unamended Merit System Act contemplates permanency of employment in the State service and promotion from time to time. Section 318 contemplates even the establishment of pension plans and establishment of retirement benefits. Section 308 provides for extraordinary appointments, referred to as temporary, emergency, exceptional and provisional appointments, but there is nothing in this section of the original Merit System Act to indicate

an intention to provide for such appointments as may be made under the Defense Council Act of May 28, 1943.

Section 308, Title 55, was amended (Act No. 348, H. 723, June 30, 1943,) by adding thereto the following:

> "When the Governor declares that an emergency warranting such action exists, such as a war or other national emergency that causes serious manpower problems, limited tenure appointments may be made. Qualification standards may be lowered in such cases, but whenever practicable there shall be competition among those meeting the lowered standards for such appointments. The Personnel Director may, however, in the absence of any appropriate list, authorize a limited tenure appointment without examination. In either case such appointments shall be for not longer than the 'duration plus six months,' and shall give persons so appointed no status in the Classified Service by reason of such durational appointment. Such limited tenure appointments shall be made by the authority designated by law, in accordance with the provisions of this Act."

This amendment, however, was not made until June 30, 1943, which authorizes limited tenure appointments to be made and consequent lowering of qualification standards only upon proclamation by the Governor that an emergency warranting such action exists. Such limited appointments and lowered standards must be predicated upon declaration by the Governor of the existence of such an emergency and, of course, in that event the amended Merit System Act would apply to Defense Council Employees. Unless and until such proclamation is made, however, I am of opinion that they are not subject to the provisions of the original Merit System Act or the Act as amended.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 9, 1943.

Hon. O. L. Andrews,

Clerk Circuit Court, Jefferson County,

Tenth Judicial Circuit of Alabama,

Birmingham, Alabama.

The Act identified as House Bill No. 333 is unconstitutional.

Act eliminating charge, for making copies of interrogatories, as court cost and applicable solely to Jefferson County is a local act and subject to the provisions of Section 106 of the Constitution.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of August 25, 1943, is as follows:

"Your opinion of November 4, 1938, stated in substance that this office must charge for making copies of interrogatories whether copies are furnished by attorneys or not.

"An Act identified as House Bill No. 333, Governor's No. 508, has recently been passed attempting to eliminate the charge for making copies of interrogatories when said copies are furnished by an attorney. The foregoing act was apparently passed as a general act and notice and proof was not given as required by Section 106 of the Constitution of Alabama.

"I would like to have your official opinion as to the legal effect of the above stated act."

The Act to which you refer is as follows:

"No. 508) AN ACT (H. 333—Snyder

To provide that in the event a party who files interrogatories in the circuit court of Jefferson County, Alabama, under the provisions of Article 8 of Chapter 10 of the Alabama Code of 1940, furnishes the clerk of the Circuit Court a copy of such interrogatories to be served on the party to whom the interrogatories are propounded, no fees or costs shall be charged or payable as for making a copy of such interrogatories.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. In the event a party who files interrogatories in the Circuit Court of Jefferson County, Alabama, under the provisions of Article

8, Chapter 10, of the Alabama Code of 1940, furnishes the clerk of the Circuit Court a copy of such interrogatories to be served on the party to whom the interrogatories are propounded, no fees or costs shall be charged or payable as for making a copy of such interrogatories.

Approved July 7, 1943."

In my opinion the Act is unconstitutional.

Section 106 of the 1901 Constitution of Alabama reads pertinently as follows:

"Sec. 106. No special, private, or local law shall be passed on any subject not enumerated in Section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without costs to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law *** and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. *** "

It is obvious that the constitutionality of the act will be determined by whether the act is general or local, and as to it being a local act there appears no doubt.

Section 110, 1901 Constitution, defines a general law as one "which applies to the whole state;" and a local law as one "which applies to any political subdivision or subdivisions of the state less than the whole." The courts of this state have consistently held that where an act was applicable to only one county, and other counties could not come within its provisions such act was a local law.

Kyle v. Wiggins, 20 Ala. App. 347, 102 So. 143;

Brandon v. State, 233 Ala. 1, 173 So. 238.

In **Birmingham Electric Company v. Harry,** 215 Ala. 458, 111 So. 41, the Supreme Court held that an Act imposing a "library tax," applicable only to Jefferson County, was a local law and void if enacted without compliance with the provisions of the quoted constitutional section.

In **Brandon v. Chambers,** 26 Ala. App. 235, 157 So. 236, it was held that an act providing for tax fees upon conviction, applicable only to Jefferson County, was a local law.

From **Wallace v. Board of Revenue,** 140 Ala. 491, 37 So. 321, holding an act dealing with numerous courts in Jefferson County was unconstitutional for failure to comply with the provisions of said Section 106, we quote:

"The act we consider is one of 33 sections, dealing exclusively with courts and their procedure, having reference to the conveniences of the

people of Jefferson County and economy in the administration of justice therein. The act is public, it is true, but local in effect, and not general in its application to the people of the whole state. No one outside of the county who does not bring himself within its influence is affected by it. If a part of the judicial machinery of the state, it cannot, on that account, as urged be held to be a general and not a local act. If so, any act dealing with courts and their procedure, such as fixing the time for their holding; the acts establishing different city courts of the state; the regulation of trials of misdemeanors in county courts, and the transfer of misdemeanor causes from the circuit to county courts, would be general laws. These have been uniformly treated as local and not general laws. Lancaster v. Gafford (Ala) 37 So. 108; Kumpe v. Irwin (Ala) 36 So. 1024; Morrow v. Earle, 122 Ala. 130, 27 So. 327. *** "

In view of the above, you are advised that, in my opinion, the Act No. 333 is unconstitutional, void, and does not change the force and effect of any opinions previously rendered by this office.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 10, 1943.

Hon. A. B. Jefferies, Chairman,

Mobile County Revenue and Road Commissioners,

Mobile, Alabama.

Mobile County—Local Acts 1939, page 298—Act No. 413, S. 420, approved July 8, 1943—County Cigarette Excise or License Tax—

Such employees as Mobile County may appoint or select in connection with administration of Act No. 413, S. 420, approved July 8, 1943, authorizing levy and collection of a tax upon the sale of cigarettes are within the classified service as defined in Section 1 of Act No. 470, H. 952, approved September 15, 1939, providing for Civil Service in Mobile County.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 16, 1943, is as follows:

"An Act of the Legislature, Senate Bill 420, approved July 8, 1943,

authorized the Governing Body of the county to levy and collect a license or privilege tax on cigarettes. Section 3 of said Act authorizes said Governing Body to make provisions for the collection and enforcement of said Act.

"An Act of the Legislature, House Bill 952, approved September 15, 1939, placed certain employees of Mobile County under civil service.

"Please advise whether or not, in your opinion, the employees, appointed under Senate Bill 420, approved July 8, 1943, come within classified service as provided in House Bill 952 approved September 15, 1939.

"We are anxious to levy this tax at the very earliest possible time and would appreciate your advising with reference to this matter as promptly as possible."

Act No. 413, S. 420, approved July 8, 1943, authorizes counties with a population of not less than 140,000 nor more than 400,000 to levy and collect a tax within certain limits in connection with the sale or storage of cigarettes, referred to in the title as excise tax and in the body of the act as a privilege or license tax, to be collected through sale of stamps affixed to the package of cigarettes when offered for sale. The act also provides that the governing body of such counties levying such a tax may by ordinance provide for collection thereof and may adopt rules and regulations for that purpose which shall have the force and effect of law. The act further provides for confiscation of cigarettes not properly stamped and for reports and records required to be kept in order to insure prompt and proper administration.

It will readily be seen from a consideration of the Act in its entirety that in order to levy and collect the tax it will be necessary for the county to provide the necessary machinery, including such employees as may be required. It is to be observed also that it is entirely optional with the county whether or not it elects to impose such a tax and the amount of the tax within the limits specified is also a matter to be determined by the county governing body.

The question is, whether such employees as the county may see fit to use in this connection come within the classified service referred to in Section 1 of Act No. 470, H. 952, approved September 15, 1939, (Local Acts 1939, page 298) regulating the county-wide Civil Service System in Mobile County?

In that Act classified service is defined as including all offices, positions and employment, "the holders of which are paid, whether by salary, wages, or fees in whole or in part from funds of Mobile County," except those in the unclassified service as defined in Section 2 of the Act. Such unclassified service as defined in said Section 2 clearly would not include whatever employees might be appointed or selected for collection of the so-called cigarette tax under the Act of July 8, 1943, supra.

This leads to the question whether funds arising from collection of the cigarette tax would be properly designated as "funds of Mobile County."

It has been suggested that inasmuch as under Section 5A of the Act

"the net proceeds of the tax, after deducting the cost of collection, shall be paid by the county to the county board of education in said county for educational purposes to be used by such county board of education as are its other funds," such funds would not be county funds under the doctrine declared in **State v. Tuscaloosa County,** 233 Ala. 611, 172 So. 892.

In that case it was held that educational funds composed of State funds allocated to the county and the three-mill county and district levies under amendment to the Constitution were State rather than county funds because the county governing body itself did not make a levy as to either class of funds.

On page 613 of the opinion, with reference to public school funds, including such three-mill school taxes, it was said:

> "The county authorities, we may note, do not levy these local taxes, but they are levied by direct vote of the people. **The county may, but is not required, to appropriate funds to public schools.** All these funds are 'vested' in the county board of education." (Emphasis added)

On page 614 of the opinion it is further said:

> "The county, through its governing body, has no interest in nor (sic) control over these funds, just as the county board of education has no interest in or (sic) control over county funds in the custody of the county depository."

Thus it appears from the Tuscaloosa case that the test to be applied in determining whether or not funds are to be designated as State or county funds depends upon whether or not the county governing body creates the fund by some duly authorized action of its own or has supervision and control over the disbursement thereof.

Applying this test to the present situation, and as above indicated, it will be seen that the cigarette tax, if levied at all, is levied and collected by the county governing body through its own employees. The fact that proceeds resulting from the levy and collection, after deducting the cost of collection, are payable to the county board of education is not, in my opinion, material. Such payment of proceeds is, in effect, merely an appropriation by the county to the public schools for educational purposes, which it is free to make or not to make depending upon whether or not it elects in the first instance to levy the tax and provide the machinery for its collection.

I am of opinion, therefore, that any employees the governing body of Mobile County may select or appoint in connection with the levy and collection of this tax will necessarily be paid out of county funds, and that such employees are, therefore, within the classified service under the Mobile County Civil Service Act.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 13, 1943.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Capitol.

County Courts—Unclaimed state witness fees—

Unclaimed state witness fees in the County Court come under Chapter 3, Title 58, and are disposed of according to its provisions.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of September 4, 1943, is as follows:

"Please refer to opinions of your Department, Biennial Report 1922-1924, page 92, and Biennial Report 1928-1930, page 558, and advise me in answer to the following:

"Would unclaimed witness fees in a County Court come under the provisions of Section 55, of Title 11, 1940 Code, or under the provisions of Chapter 3, Title 58?"

The Act of 1915, General Acts, page 862, approved September 25, 1915, which act reestablishes the county courts throughout the State nor Title 13, Section 321, conferring jurisdiction on such courts does not designate it as a court of record. It has no constitutional powers, therefore, it is purely a creature of the statute. It has been held by our courts that unless such inferior court is by statute designated as a court of record it is not such a court. **Willett v. Weaver,** 205 Ala. 268, 87 So. 601.

I now refer you to Title 11, Section 55, Code of Alabama 1940, to which you refer, and which is as follows:

"§ 55. Report filed with county treasurer.—On the first day of January in each year, all **clerks of courts of record** within this State shall file with the county treasurer or custodian of county funds a full and complete report of all witness fees collected by them or received by them from their predecessors in office which have not been disbursed to the persons legally entitled thereto, and shall pay into the county treasury all such witness fees which have been collected by them or their predecessors more than two years preceding the making of said report. Said report shall show the amount and date of collection, the name of the witness for whom collected, and the court, style of the cause, and date of its final termination, in which said fee was collected."

It is to be noted that the above quoted section, in so far as the distribution of unclaimed witness fees is concerned, only applies to courts of record.

Since it has been held hereinabove that the county courts created by statute, of which the probate judge is ex officio judge, are not courts of record, it is my opinion that such courts would not come within the purview of Section 55, supra.

You refer to Chapter 3, Title 58, Code of 1940. This chapter has reference to fiduciary funds and provides for the distribution thereof.

Title 58, Section 31, Code of Alabama 1940 reads as follows:

> "§ 31. Fiduciary funds defined.—Fiduciary funds as used in this chapter shall include any sums whatsoever which have come into the hands of such officer and of which he is not the absolute and unqualified owner, including witness fees and other fees or funds to which any person is entitled, other than himself."

Since it has been pointed out hereinabove that unclaimed witness fees in county courts do not come within the purview of Section 55, Title 11, Code of 1940, it necessarily follows that such unclaimed witness fees must be disposed of as provided by Section 31, Title 58, Code of 1940, and you are so advised.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 14, 1943.

Hon. J. S. Wittmeier,

Probate Judge, Blount County,

Oneonta, Alabama.

Blount County—Local Act, 1943 H. 414—Elrod—held unconstitutional as violating Section 106 of the Constitution.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 10, 1943, is as follows:

"To regulate the fine and forfeiture fund of Blount County, and to provide the registration and payment of claims against said fund. (H. 414—Elrod.)

"These questions may seem a little wild, but we would like for you to advise us upon the following statement of facts.

"Section 2. (H. 414—Elrod, provides that the solicitors' fees collected in all cases tried in the circuit court shall be paid into and constitute the fine and forfeiture fund of said county.

"Section 242. Title 13 of the Code of 1940 provides that all fees which may be by law taxed as solicitors' fees against defendants on conviction secured by a solicitor who is paid a salary by the state, belong to the state, and, when collected, must be paid into the state treasurer.

"The Circuit Solicitor in this Circuit is paid by the state and we would like to know if the solicitor's fees collected in all cases tried in the circuit court can be paid into the fine and forfeiture fund as provided by (H. 414—Elrod.

"Section 3, of H. 414—Elrod, provides that it is the duty of the Court of County Commissioners to record in a well bound book, all claims presented for registration, showing in each case the name of the owner of such claim, the date and amount of same. The Code of 1923, Section 303 provides the manner of registration and would this local act supersede the general law governing the fine and forfeiture fund.

"The general law Section 103, Title 11 of the Code of 1940 provides that witnesses are entitled to five cents for each mile traveled, and the (H. 414—Elrod, provides two and one-half cents per mile. We would like to know which one we will governed by in issuing witnesses their fees for attending in criminal cases, the local act or the general law.

"Section 9 of H. 414—Elrod, provides that it shall be the duty of the Clerk of the court of county commissioners of said county, on presentation of certificates issued, after the passage of this act, to witnesses before the grand juries and state witnesses in all criminal cases, as required by law, to draw his warrant on the county depository or other custodian of the general funds of said county, for the amount of such certificate.

"Section 51, Title 12 provides that all warrants drawn upon the depository must be signed by the probate judge of said county or the president of the board of revenue or court of county commissioners of the different counties. We would like to know if the clerk has the authority under this local bill to draw a warrant against the general fund and if the same is legal.

"I am enclosing a copy of the notice given by publication in the Southern Democrat of H. 414—Elrod. The copy of the law that I have seen approved June 3, 1943 is not as it was advertised. You will note that Section 8 has been changed in this bill from the way it was advertised.

"In order that Commissioners Court of Blount may have available a comprehensive interpretation of the application of this local law H. 414—Elrod, we would like for you in your opinion give a general discussion of each section in order for it to be more clear to me."

The answers to your specific questions become unnecessary because the Local Act as it passed through the Legislature was amended or changed from the proposed local act as published and advertised.

In the Local Bill as advertised the following provision appeared in Section 8:

" *** . And in all such cases disposed of in the Inferior Court of Blount County, Alabama, the fees of the Judge of the Inferior Court, and the Sheriff of Blount County shall be paid in like manner as the fees of the Clerk of the Circuit Court, and the Sheriff of Blount County are paid in cases disposed of in the Circuit and County Courts of said county. *** "

And, in Section 10:

" *** . Provided that in cases disposed of in the Inferior Court of Blount County, Alabama, such statement shall be filed by the Judge of said Court, and the Sheriff of Blount County, on the first day of each month after the passage of this act. *** "

These provisions were omitted from the Local Act as finally passed.

The Constitution does not require the whole text of a proposed bill to be published but requires the "substance" only. Constitution of 1901, Section 106.

Publication of local acts as required by our Constitution is to prevent deception of those immediately affected by the local legislation to the end that they may have an opportunity to protest against the proposed enactment. **Gray vs. Johnson,** 235 Ala. 405, 179 So. 221.

> "If the details are not published but only the general nature of its substantive features, the public is put upon inquiry as to such details, and bound by a failure to inform itself, continuing through such changes and amendments as may stay within such substantive features as published. But if the publication gives detail the public need not pursue the inquiry further in respect to such details; for the information is complete, and it has a constitutional right to assume that such details will not be materially changed throughout the journey of the bill to its final passage and approval."

State ex rel. Wilkinson vs. Allen, Judge, 219 Ala. 590, 123 So. 36.

In my opinion the omitted part cannot be said to be a detail or an immaterial change. Under the bill as advertised the Judge of the Inferior Court would have received his fees in certain criminal cases enumerated in Section 8 of the Local Act from the General Fund. Also in such cases disposed of in the Inferior Court the Sheriff would have likewise received his fees from the general fund of the county. In the act as passed this procedure is not authorized. Further the amounts that would have been paid out by the county under the Local Act as advertised; and now under the act as passed, become prior claims against the fine and forfeiture fund.

This opinion does not conflict with the decisions of the Court of Appeals in **Buchmann vs. Lambert,** 18 Ala. App. 339, 92 So. 211; and **Mitchell vs. Gorham,** 26 Ala. App. 463, 162 So. 135.

In my opinion this Local Act is unconstitutional and void because it violates Section 106 of the Constitution of 1901.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 15, 1943.

Hon. B. P. Singleton,

Chief Examiner of Public Accounts,

Capitol.

Court Reporter of Jefferson County may be paid from the solicitor's fund for certain services rendered outside his official duty.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, dated September 9, 1943, is as follows:

"The question has arisen in Jefferson County as to whether or not a Court Reporter, working under Civil Service and being paid a regular salary by the County as official Court Reporter, can lawfully charge the County for taking and transcribing testimony for the State.

"The conditions under which the testimony was taken and transcribed are set out below.

"On May 23, 1943, a warrant was sworn out against James Howard Blue for murder in the first degree for the unlawful murder of his wife. The Deputy Solicitor, Arthur Green, deemed it necessary for the suppression of crime to have the testimony of Florence Hill, a negro cook employed by the Blues, reported and transcribed. Around 4:45 P. M. he procured the services of William H. Schanz, official court reporter of the Bessemer Division of the Circuit Court of Jefferson County, to report and transcribe the testimony of the said Florence Hill. Mr. Schanz was called to the courthouse to take the testimony of Florence Hill immediately following the funeral of Mrs. Blue, as the Solicitor deemed it advisable to take this witness's testimony at that time, and Mr. Schanz, being capable of doing such work, was employed to do this work hurridly.

"The testimony was taken, reported, and transcribed by Mr. Schanz during his off hours. He rendered Jefferson County a bill for transcribing the same in the amount of $18.00. No charge was made for reporting the testimony.

"On July 2, 1943, a preliminary hearing was held for the above named defendant, and Mr. Schanz was employed by the defendant to report the testimony at said hearing in the Municipal Court of Bessemer. He is not the official Court Reporter of this Court. The defendant, having ordered the transcript of said testimony, the Deputy Solicitor, Mr. Green, therefore, ordered Mr. Schanz to furnish him a copy of the same, for which no per diem charge was made for his services against the State or County but only the lawful charge for copy of said transcript, which was deemed necessary by the Solicitor to have for use in the trial of the

defendant. The charge for this transcript was $163.53.

"The Circuit Solicitor, Hon. R. E. McAdory, of Jefferson County, executed a voucher to Mr. Schanz for $181.53, covering the two charges herein above mentioned, which was drawn on the Solicitor's Fund under General Acts of 1943, page 200 (Dixon's Local Laws of Jefferson County, Alabama, page 297, Article 59).

"Please advise me if in your opinion this voucher can be paid out of the Solicitor's Fund of Jefferson County."

Subject to the following presumptions, it is my opinion that your inquiry should be answered in the affirmative.

Title 12, Section 133, et seq., 1940 Code, provides for the creation of a "Civil Service System" in Jefferson County. Under the provisions of Section 144 thereof the Director of Personnel prepares for the Board, its acceptance or rejection, rules and regulations necessary for the administration of a scientific and economical personnel system of county employees.

It is presumed that Mr. Schanz is employed under the "Civil Service System;" that he is required to perform the same services as are ordinarily performed by court reporters, no more and no less.

It is not unusual for a solicitor to be confronted with a situation of such exigency that immediate action is necessary. To permit the proper administration of justice the legislature of Alabama authorized certain expenditures by the solicitors of the Tenth Judicial Circuit. See Acts 1923, p. 200, now Title 62, Section 365, 1940 Code, which reads pertinently as follows:

"§ 365. *** The circuit solicitor shall have the power and authority to employ any assistants or assistance and incur any expense he may deem necessary to properly administer justice, and such expense shall be paid out of the solicitor's fund of such county, *** "

Title 62, Section 366, prescribes the duties of the official court reporter, and he is not required thereunder to assist in the assimilation of evidence, or to take down statements of persons who are prospective witnesses. In **Gore v. State,** 22 Ala. App. 136, 114 So. 791, it was held:

"(6) The solicitor's stenographer for Jefferson circuit court is provided by an act of the legislature of 1923, approved August 22, 1923 (Acts of 1923, p. 200). There is no provision in that act that the stenographer therein provided **acts in any official capacity, or that his notes when transcribed shall be official or a part of the court records.** He is to all intents and purposes the secretary of the solicitor, to make and keep memorandums and reports of proceedings to aid the solicitor in the prosecution of cases. In this they differ from the official reports of court stenographers provided under section 6734 of the Code of 1923 and similar statutes under consideration in such cases as **Todd v. State,** 13 Ala. App. 301, 69 So. 325. *** " (Underscoring supplied).

It is also noted that at the preliminary hearing, on June 2, 1943, Mr. Schanz was employed by the defendant and not by the State or Jefferson County. In directing the reporter to prepare a transcript of that proceeding the solicitor ordered the performance of an act entirely outside the reporter's duty as an employee of Jefferson County, or as a court reporter, though within the solicitor's authority under the cited code section.

I find nothing in the statutes of this state preventing the payment of Mr. Schanz's claims, and unless some rule or regulation of the Jefferson County Civil Service prevents, am of the opinion that the voucher may properly be paid from the solicitor's fund.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 15, 1943.

Hon. O. L. Andrews, Clerk,

Circuit Court, Jefferson County,

Birmingham, Alabama.

Jefferson County Library Tax in criminal cases—

The Library Tax imposed in each civil or quasi civil action at law, suit in equity, criminal case, quasi criminal case, proceeding on forfeited bail bond, & c., given in connection with an appeal from the judgment of conviction in any inferior court or municipal court to the Circuit Court hereafter filed, arising in, both by appeal or certiorari or otherwise to the Circuit Court of Jefferson County, Alabama, there shall be taxed as costs the sum of $1.00, & c., is a tax and not costs, and therefore a defendant convicted in a criminal case cannot be sentenced for same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion, bearing date of September 9, 1943, is as follows:

"In an opinion rendered by your office November 5, 1940, in Volume 21, on page 140, you ruled that a defendant could not be sentenced to hard labor for the State Trial Tax.

"In the Code of 1940, Title 62, Section 138, a Law Library Tax was

created for Jefferson County levying a charge of $1.00 on each case docketed in Circuit Court in both Civil, Criminal, Quasi Criminal and Chancery Cases. Please give me your official opinion as to whether a defendant could be sentenced to hard labor for the above mentioned Law Library Tax, or if it should be left off of hard labor cost bills as is now done in the State Trial Tax."

My answer to the above is in the negative, that is, a defendant cannot be sentenced for such library tax. I think the case of **State v. Montevallo Coal Mining Co.,** 197 So. 82, very definitely settles this question. This opinion holds:

"A charge fixed by statute for service not performed by officer is not a 'fee,' but a 'tax,' where object thereof is to provide general revenue, rather than to compensate officer, and amount thereof has no relation to value of his services and is eventually paid into treasury of governmental branch whose officers collect it." See Words and Phrases, Permanent Edition, for all other definitions of "Fee' and "Tax."

On petition of this case for certiorari to the Supreme Court Judge Livingston in denying the writ has this to say:

"We are of the opinion that the Court of Appeals correctly decided that settlements between employer and employee consummated under the provisions of Section 7550, Code of 1928, are subject to the three dollars 'trial tax,' levied by Section 9 of the Revenue Act of 1935 (General Acts 1935, pages 256-263), and to the Jefferson County library tax, levied by Act of the Legislature approved August 11, 1927 (General Acts 1927, page 261). The taxes above referred to are not 'court costs' as that term is defined and understood in the law, even though collected as 'court costs.' Certiorari is therefore denied."

The above opinion denying the writ states without equivocation that this library tax is not "court costs" and a defendant in a criminal case can only be sentenced for court costs. Therefore, the defendant in such a case cannot be sentenced for such library tax.

The library tax of Jefferson County as held by the authorities cited above is simply a debt and to imprison a person for this would be imprisonment for debt which is directly prohibited by both the Federal and State Constitutions.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 16, 1943.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Capitol.

STATUTES—

PRIVATE STATUTES WHEN VIOLATIVE, SECTION 94, CONSTITUTION—

1. Private act authorizing a county to refund or pay to an individual public funds is violative of Section 94, Constitution 1901, unless the claim is just, moral, equitable and for a public purpose.

2. In construing such a statute it is proper to do so in connection with Section 94, Constitution 1901, statutes dealing with similar questions and take into consideration the results that flow from holding the act valid.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of September 4, 1943, is as follows:

"Please refer to H. B. 743, Local Act 268, approved by the Governor June 24, 1943, and advise me in answer to the following:

"Is the above Bill constitutional in the light of Section 100 of the 1901 Constitution?

"For your information, the refunds to the County Treasury totaling $1,233.34 mentioned in the Act were refunds made by Probate Judge J. Lee Smith account of charges made against him by Examiners of Accounts where he had drawn, at various times, all or part of the $400.00 Road Service Ex-Officio Fee and his records showed that his net annual compensation from his office exceeded $5,000.00. (See Section 29, Title 11, 1940 Code.)

It has long been the settled law of this State that the legislature is the representative of the people who are the sovereigns and that it may make any legislation it sees fit, wise or foolish, just or unjust, except where restrained by the powers delegated to the United States Government by the people of the State or by the Constitution of the State, which is a creature of the people. **Dorman v. State, 34 Ala. 216.**

The local Act inquired about in your letter is in no wise forbidden by the Federal Constitution. You ask if the Act does not contravene Section 100 of the Constitution of 1901. We think it very doubtful as to whether or not this section applies to the enactment under consideration. In my opinion, Section 94 of the Constitution does apply in view of the statement contained in your letter. This section of the Constitution provides that the legislature shall not have power to authorize any county, city, town or other subdivision of the State to grant public money or things of value by a county in aid of or to any individual, etc. Our courts have given this provision a rather liberal construction. They hold that the legislature may without violating this section make or authorize to be made an appropriation of public monies for a public purpose, such as an appropriation to pay a just claim against the State or county authorities. Such claim need not be legally enforcible. It must be a moral claim, based on equity and justice. It must also be a case where it fairly can be thought that the public good will be served by the grant. **Board of Revenue and Road Commissioners of Mobile County v. Puckett,** 227 Ala. 374, **State ex rel Dorlan v. State,** 6 So. (2d) 898.

In the Puckett case, supra, the Court said:

> "That the legislature has to a great extent the right to **determine** the question as to its being such a claim as is described above, and that its determination is conclusive except when it does not clearly appear to be wrong."

It isn't apparent just what is meant by the expression when it does not clearly appear to be wrong. Nor is it made to appear just how this is to be ascertained, but it is clear that the determination of the legislature is not absolutely conclusive so as to foreclose any effort to show that its conclusions are clearly wrong. The thing or facts to be determined by the legislature is that the claim authorized to be paid by it is a righteous, just and moral one, and that it is for a public purpose, and not proscribed by Section 94 of the Constitution.

It would appear that there must be a determination by the legislature and if the facts determined by it are expressed in the legislative enactment then that would probably foreclose any further inquiry unless the facts there recited show that the claim is unjust. If their determination is open to assault on the grounds that it is wrong then it needs be that it may be shown by extrinsic matters. The primary rule in construing an enactment is to ascertain and give effect to the legislature's intention, and to do this we are not confined to the literal meaning of the words used but may look to other provisions of the Act and consider it in relation to constitutional provisions on the subject, view its history and purpose, and the purpose sought to be accomplished, and we may critically examine the result that would flow from giving the statute a meaning it might have if none of these things were considered. **Abramson v. Hard,** 229 Ala. 2.

Keeping these things in view, it is not to be presumed that the legislature intended to violate Section 94, of the Constitution and the following provisions of Code, Title 11, Section 29; "Discharging his duties in relation to public roads on proof to the county commissioners that he had discharged such duties annually, to be paid out of the county treasury not exceeding $400."

These quoted provisions fix the annual compensation for the probate judge for services rendered as therein stated.

If the matters and questions authorized to be looked to by us, as shown by the Abramson case, supra, are not to be applied here then all that is necessary to evade Section 94 of the Constitution is to pass an act directing the county to refund to an official monies he has paid to the county to cover shortages caused by embezzling county fund. Moreover, the Act in question, on its face, determines nothing with definiteness, if it determines anything. It simply authorizes a refund of monies paid the county by the named beneficiary of the Act to cover excess monies he had received under Title 11, Section 29, above cited.

It may be argued that the Act on its face shows that the grant is clearly wrong. In the Puckett case, supra, the Act recited the determination of the Legislature that the money sought to be paid was where a person was hurt in the performance of his duties while acting for the county within the scope of his employment. This very language shows that it was a just claim. The Court in the Puckett case laid stress on these recitals in the Act. In my opinion, the local act under review is violative of Section 94, of the Constitution of 1901, and, therefore, void.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 16, 1943.

Hon. Roy Johnson,

Tax Assessor, Jefferson County,

Birmingham, Alabama.

TAXATION—

Exemption of insane person and title at tax sales—

1. Code, Title 51, Section 2(f), exempts property of insane persons from ad valorem taxation to the extent of two thousand dollars.

2. The assessment of such property, sale, and purchase by the State at a tax sale is void and passes no title or interest to the State that it can convey to a purchaser.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of August 26, 1943, is as follows:

"I would like to have your opinion on the following case:

"Mr. Russell P. Morris has been a mental patient in the Veteran's Hospital since November 30th, 1920. After he was admitted as a mental patient a brother handled his real estate assessment in this county, (which consists of one half of a vacant lot) through 1931. This brother died without telling anyone of the other relatives of his having handled the assessment and having paid the taxes.

"The taxes were paid up to 1931 and the property should have been exempt from 1920 on but no one in this office knew that. In 1931, the property sold for taxes at an assessed value of $500. In view of the fact that this man has been insane since the World War and the circumstances outlined above, I am asking whether or not on a redemption it is necessary for me to charge all of the taxes from 1931 to date to this man whose property should have been exempt from 1920.

"Someone has applied to the State to purchase the property for taxes and I would appreciate a quick reply so that I can advise his other brother, who is now trying to clear up the matter, what your opinion is."

Your letter asks an opinion as to matters necessary for redemption of lands sold to the State for taxes. Yet your letter indicates that someone is seeking to purchase the land from the State.

The statute, Code, Title 51, Section 2, exempts from ad valorem taxation

named persons and property. No. (f) of this section exempts the property of insane persons to the extent of two thousand dollars. It would seem that this completely answers your letter if the property sold was that of an insane person at the time of assessment and at the time of sale to the State by the express provisions of the Code, it is not subject to the extent of two thousand dollars. The State had no authority to sell such property, nor to buy the same at the tax sale. It is well settled that no valid sale for taxes can be made of property not liable for taxes. 61 **C. J.**, page 1132.

A sale for taxes of property on which the taxes have been paid is void. **61 C. J.,** page 1120. A sale for taxes of property that is exempt from taxation is also void: **61 C. J.,** page 1295, Section 801. The sale being void, the State got no title to convey. Any attempt by it to convey such land to a purchaser will give no title. The State can convey only such title as it has and it has nothing. **Hooper v. Bankhead,** 171 Ala. 626.

Under these principles the State has nothing to sell nor has it anything that may be redeemed from it.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 17, 1943.

Hon. T. C. Garner, Treasurer,

Treasurer's Department,

Jefferson County,

Birmingham, Alabama.

Jefferson County—County Treasurer—Jefferson Hospital—Title 37, Sections 341-352, Code of Alabama 1940—

1. The Treasurer of Jefferson County is charged with the same duties and subject to the same liabilities in respect to funds of the Jefferson Hospital as he is in respect to any other funds of Jefferson County.

2. Sureties on the official bond of the Treasurer of Jefferson County are liable for the illegal expenditure by the Treasurer of Jefferson County of funds of the Jefferson Hospital to the same extent that they are liable for the illegal expenditure by said Treasurer of any other funds of Jefferson County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of August 30, 1943, is as follows:

"The Jefferson Hospital was constructed and is now being maintained by Jefferson County, Alabama under provisions of an act approved June 26, 1935 (1935 General Acts, page 195). This act was brought forward into the Code of Alabama of 1940 as Sections 334, 341-352 Title 37.

"All of the bonds issued by the County have been sold to the Reconstruction Finance Corporation, an instrumentality of the United States, and they are revenue-producing bonds. None of them constitute a general obligation of the County. Contracts made by the County Commission for the use and benefit of the hospital, and all merchandise or other articles purchased by the County Commission for the Jefferson Hospital do not constitute general obligations of the County. It is expressly stipulated in all of such contracts and in each and every order made that all amounts due thereunder shall be payable solely from the revenue derived from the operation of the hospital.

"At the time the bonds were issued for the construction work I was designated by the County Commission as the custodian of all of the funds in a special account in the bank, so denoting the funds in question. All expenditures made from this fund are passed upon by the County Commission and all checks or vouchers, after being signed by the President of the County Commission and the Director of the hospital are counter-

signed by me. In the event an illegal claim is approved and payment ordered, am I legally liable for such amount? Is the fund in question simply a trust fund of which I am the custodian, or am I personally liable, and the sureties on my offical bond as County Treasurer for and on account of the illegal or unlawful expenditure of any of these funds?

"In this connection, I have made no official bond other than the one required in my capacity as County Treasury."

In order to answer your inquiry it is necessary to first determine whether or not the funds of the Jefferson Hospital are funds of Jefferson County.

The Jefferson Hospital was constructed and is operated under the provisions of Act No. 154, H. 482, approved June 26, 1935, (General Acts, 1935, page 195). This Act was brought forward into the Code of Alabama 1940 under Title 37, Sections 341-352.

The title to the property on which the hospital was erected vests in Jefferson County. The building is the property of Jefferson County, subject to the right of the bondholders, in case of default on the bonds, to have a receiver appointed to operate the hospital. The County Commission of Jefferson County has authority to appropriate money out of the general fund of the county to assist in the operation of the hospital. See opinion of this office rendered to Hon. R. H. Wharton, President, Commission of Jefferson County under date of July 2, 1940, and found in Quarterly Report Attorney General, Vol. 20, page 8.

While it is true, under the provisions of Title 37, Section 348, that the revenue anticipation bonds issued for the construction of the hospital do not constitute a debt of Jefferson County and the County is not liable thereon, said bonds not being payable out of any funds other than the revenue obtained from the operation of the hospital, expenses legally incurred by the county in the operation of the hospital are legal claims against the County.

The hospital is operated by the County. The revenues derived from such operation are county funds, however such funds are subject to the covenants contained in the bond resolutions (Title 37, Section 345). The fact, as stated in your request, that it is expressly stipulated in all contracts made by the County for the use and benefit of the hospital and all orders for the purchase of supplies, that all amounts due thereunder shall be payable solely from revenue derived from the operation of the hospital does not alter the situation. The revenue derived from the operation of the hospital, being County funds, such payments are made from county funds.

It follows that, as Treasurer of Jefferson County, you are charged with the same duties and subject to the same liabilities in regard to the funds of the Jefferson Hospital as you are in regard to any other funds of Jefferson County. This conclusion brings your inquiry within the scope of an opinion rendered to you by this office under date of October 1, 1938, Quarterly Report of Attorney General, Vol. 13, page 5, in which it was held:

1. Treasurer of Jefferson County is liable for the payment of a claim, even though the claim has been examined and allowed against the county

by the County Commissioners, duly recorded in their minutes, and a voucher for same has been issued upon their authorization and signed by the Chairman or the President Pro Tem of the Commission, if the invalidity of said claim appears upon its face, or upon the face of the records of the Court of County Commissioners, or the Treasurer has actual knowledge of its invalidity.

2. In such a case, the Treasurer of Jefferson County is not liable for the payment of such a claim, if the invalidity of same does not appear upon its face, or upon the face of the records of the Court of County Commissioners, or he does not have actual knowledge of its invalidity.

Inasmuch as I have concluded that your liability for the illegal expenditure of funds of the Jefferson Hospital is the same as the illegal expenditure of other County funds, the sureties on your official bond as County Treasurer would likewise be liable for such illegal expenditure of these funds.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 17, 1943.

Hon. Van B. Gilbert, Director,

Department of Public Safety,

Capitol.

Drivers License—Renewal, held that when person holds expired license one period having intervened before application for renewal is made, Director of Public Safety by rule or regulation may prescribe an examination or issue renewed license without examination.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion, bearing date of September 4, 1943, is as follows:

"Will you please render a decision on the following item at your earliest convenience?

"Applicant A holds a 1941 Drivers License in Alabama, but, being absent from the State in 1942-43, failed to have the license renewed. After October 1, 1943, he makes application for renewal of his license for 1944-45. Is he required to take the examination before issuance of the

1944-45 license?"

When used in this opinion a 1941 drivers license means a license expiring on September 30, 1941; a 1944-45 drivers license means a license expiring September 30, 1945.

In my opinion the question of whether or not applicant A in your question above should be required to take an examination before issuance of the 1944-45 drivers license is a matter of discretion to be decided by the Director of Public Safety.

When the drivers license law was enacted in 1939 provision was made for the issuance of drivers license covering a two-year period. The first period ended September 30, 1941. Title 36, Section 59, Code of Alabama, 1940. Provision was also made for the renewal without examination of old drivers licenses for the following two-year period.

In my opinion the part of Title 36, Section 59, stating:

> " *** Every Driver's License issued under this article shall expire at the end of the licensing period during which the same is issued, but may be renewed, without examination, upon application and payment of the fee and in the manner hereinafter provided for. All renewals shall be for the licensing period hereinafter provided for, but any license may be renewed at the end of each licensing period upon application and payment of the fee and in the manner hereinafter provided for,"

means that all licenses expiring for the present period ending September 30, 1943, may be renewed without examination unless the Director of Public Safety requires an examination for any particular individual now holding a license. (Title 36, Section 63).

However, applicant A does not presently hold a license. His license expired September 30, 1941. He did not renew his license. Applicant A holds an expired license (September 30, 1941).

In my opinion the Director of Public Safety may cause to be promulgated a rule or regulation (Title 36, Section 72) stating that applicants such as applicant A may have a renewal of their 1941 drivers license and that such renewal shall be effective October 1, 1943 (1944-45 drivers license). On the other hand the rule may state that such applicant shall take an examination for an original license. In either event it is my opinion that the rule would not be in conflict with the drivers license law.

In promulgating a rule to govern persons in the position of applicant A, you should determine whether such class of applicants should or should not reasonably be required to take examination.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 20, 1943.

Hon. Chester Walker,
Judge of Probate, Tuscaloosa County,
Tuscaloosa, Alabama.

Code 1940, Tit. 30, §§ 8, 10, 12—County Jury Commissions—Compensation—Code 1940, Tit. 1, § 14—Tuscaloosa County—

1. Compensation of members of county jury commissions is to be determined on a population basis according to the Census of 1930 in all cases where they were appointed prior to August 2, 1943.

2. Compensation of jury commissioners of Tuscaloosa County appointed prior to August 2, 1943, may not exceed $300 in amount for any one year of their four-year term of office.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 23, 1943, is as follows:

"Under General Acts, 1939, page 86, Jury Commissioners were established in each county of the State. The Act was approved March 2, 1939, and was brought forward in the Code of 1940, Title 30, Section 8.

"By Section 25 of said Act of 1939 all laws, general, local or special, in conflict with the Act were repealed, with certain exceptions stated therein. It was expressly stated that it was the intention of the Legislature that the subjects covered by the Act be exclusive law on all such subjects.

"Under an Act approved August 16, 1939, General Acts, 1939, page 388, brought forward in the Code of 1940, Section 14, Title 1, the ninetieth day after the first day of the first regular legislative session held, next, after the publication by the Federal Government of the regular Federal Decennial Population Census for Alabama, was fixed as the date for any reclassification under any law requiring reclassification based on such Federal Census.

"Under the 1930 Federal Census in effect when the 1939 Act, page 86, was passed, the population of Tuscaloosa County was 64,153, and under the 1940 Federal Census when the 1940 Code was adopted, May 31, 1941, the population of Tuscaloosa County was 76,036.

"Governor Sparks appointed three Jury Commissioners for Tuscaloosa County, and their yearly term of office runs from the first Monday after the second Tuesday in January, 1943, until the same time the following year. See Attorney General's Report, April-June, 1939, page 249. Said Jury Commissioners to serve for a term of four years, and since taking

office they have already drawn for the performance of their duties the sum of $245.00 each.

"By Section 12, Title 30, Code of Alabama, 1940, the pay of the Jury Commissioners is fixed at $5.00 per day, not to exceed $300.00 in any one year, in counties of 50,000 and not to exceed 75,000 population, and $5.00 per day, not to exceed $600.00 in any one year in counties over 75,000 population. The population to be determined by the last preceding Federal Census.

"Under these circumstances what is the maximum amount allowed by law to the Jury Commissioners of Tuscaloosa County from the first Monday after the second Tuesday in January, 1943, to the same time in 1944, and in each year thereafter during their term of office? In other words, are they limited to $300.00 per year or $600.00?

"If it be held that their pay is governed by Section 12, Title 30, Code of 1940, and that the maximum of $600.00 per year was applicable to them when they were appointed, the question is answered. If, however, the Act of 1939, page 388, is applicable to postpone the classification which brings about an increase in pay in counties of over 75,000 population until the 90th day after the first day of the first regular session of the Legislature of 1943, such increase in pay from $300 to $600.00 per year may offend Sections 68 and 281 of the Constitution. The Reports of the Attorney General, April-June, 1939, page 270, and July-September, 1939, page 293, may be helpful.

"I would appreciate your opinion as to what law governs the pay of our Jury Commissioners and the maximum amount they can earn in any one year including the first year of their term."

In an opinion rendered to you February 25, 1943, Quarterly Report Attorney General Volume XXX, page 86, this office held that by reason of Code 1940, Title 1, Section 14 (General Acts 1939, page 338) the Federal Census of 1940 did not take effect as a basis for classification according to population until August 2, 1943.

From your letter it is inferred that incumbent jury commissioners for Tuscaloosa County were appointed prior to this date so that at the time of their appointment their compensation was based on the Census of 1930, according to which Tuscaloosa County had a population of 64,153. The term of office and compensation for jury commissions are alike fixed by law, as are also their duties,—so that they are, of course, beyond question, public officers within the meaning and purview of Section 281 of the Constitution of 1901. **Hard v. State ex rel Owen,** 228 Ala. 241, 153 So. 725.

That case holds that one who performs a public function and whose authority is derived directly from the State by legislative enactment and whose powers, duties and authority are prescribed by law is a public officer within the meaning of said Section 281, forbidding increase or decrease during the term for which he shall have been elected or appointed, of compensation, salary, or fees of any officer holding any civil office of profit under this State or any county or municipality thereof. Thus it will be seen that when

Tuscaloosa County Jury Commissioners were appointed in the early part of this year their compensation was fixed and determined by law not to exceed $300 for any one year of their respective terms of office inasmuch as at that time their compensation was based upon population as shown by the 1930 Census. Code 1940, Title 30, Section 12.

The term of office of the commissioners is definitely fixed at four years and they hold office "during the Governor's tenure of office and until their successors are appointed and qualified." In other words, their term of office coincides with that of the Governor himself who appoints them. Code 1940, Title 30, Section 10.

Section 281 of the Constitution has been construed and applied in many cases. Thus in **Franklin County v. Richardson,** 202 Ala. 46, 79 So. 384, it was held that where the county governing body had once fixed the compensation to be paid to members of the county board of equalization who held office for a term of four years the county board was on account of the constitutional section aforesaid not authorized subsequently to change such compensation. Said the court:

> "The statute specifically provides that the county board of equalization shall be composed of three freeholders *** who shall be appointed for a term to expire on the first day of October of each fourth year, thus fixing a definite term of office that is protected under the Constitution (citing cases) *** . When the reasonable compensation for the services for such county board of equalization was fixed by the court of county revenue or other court or board of like jurisdiction in the respective counties, it became fixed in the sense that it was not subject to diminution or increase during the term of office fixed by the statute, which first term was to expire on the first day of October 1919 and thereafter on the first day of October of each fourth year. Morgan County v. Fidelity and Deposit Company, 77 So. 233; Const. § 281."

See also **Hard v. State ex rel Owen,** supra, **Carnley, Judge, v. Moore,** 218 Ala. 274, 118 So. 409; **McMurray v. County Board of Education,** 216 Ala. 144, 112 So. 644.

I am of opinion, therefore, that the compensation of jury commissioners for Tuscaloosa County may not exceed $300 in amount for any one year of their term of office during the entire term of four years for which they have been appointed pursuant to Code 1940, Title 30, Section 10.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 21, 1943.

Hon. Charles Thigpin,

Tax Assessor, Colbert County,

Tuscumbia, Alabama.

Code 1940, Tit. 51, §§ 66, 67—Tax Assessor—Lot and Plat Books—reasonable Compensation—

1. In fixing compensation for tax assessor for services rendered under Code 1940, Tit. 51, §§ 66, 67, the county governing body exercises a delegated legislative power, the exercise of which will not be revised in the absence of clear evidence of an abuse of its discretion.

2. Tax assessor may present claim for what he considers reasonable compensation for such services but it is the duty of the governing body to determine what is reasonable and its judgment will be final and conclusive in the absence of clear evidence of abuse of discretion.

3. In determining such question the county governing body should consider whatever evidence the tax assessor may offer as to the reasonable compensation he claims and also such other evidence as it deems material.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of September 13, 1943, is as follows:

"Title 51, Section 66, Code of Alabama 1940, providing for the duties of the Tax Assessor, in preparing and keeping a Lot Book, of all property which has been platted and filed for record in the office of the Judge of Probate of the respective counties, among other things, provides that the Tax Assessor shall annually make the entries thereon for which he may be allowed a reasonable compensation by the Court of County Commissioners or Board of Revenue.

"Title 51, Section 67, Code of Alabama 1940, relates to the making and keeping of a Plat Book of all real estate in the County. This Section provides that the Court of County Commissioners shall pay out of the general fund of the County for making out the plat book required by this and the preceding Section, a reasonable compensation to the person performing said work, which debt shall be preferred claim against the County.

"Your opinion is requested on one question which has arisen in my interpretation of these two Sections.

"1. Who decides what is a reasonable compensation for these services and what evidence should be resorted to in making the allowance?

"I have been Tax Assessor for a number of years and my opinion is that I have never received reasonable compensation for my services in keeping the Lot Book."

In fixing "reasonable compensation" for a tax assessor's services required to be performed under Code 1940, Tit. 51, §§ 66, 67, the county governing body exercises a delegated legislative power, and its action in that regard is not subject to review, "in the absence of clear evidence of such manifest abuse of power and disregard of the statute as to show that the board failed to exercise a legal discretion." 43 Am. Jur.—"Public Officers"—p. 150 § 362, note 8.

Ordinarily what is "reasonable compensation" for services, or for work and labor done, for which an action will lie under the common counts, is a question of fact, to be determined upon competent legal evidence, in case of dispute, as any other issue of fact in a court of law.

Such is not the rule or doctrine, however, as between public officers and the state or any of its political subdivisions, agencies or instrumentalities. Public officers take and hold office strictly upon such terms as may be prescribed by law. Their compensation does not arise in contract; it is incidental merely to the office. It is fixed primarily by the legislature, but the power may be delegated by the legislature to some other public body or officer, and when so delegated and exercised its exercise may not be revised or reviewed except in cases of gross abuse. 43 **Am. Jur.**—Public Officers— p. 35, § 341, note 14; p. 139, § 345, note 12, 346 (13). See also: **Morgan County v. Fidelity and Deposit Co.,** 200 Ala. 690, 77 So. 233; **Franklin County v. Richardson,** 202 Ala. 46, 79 So. 384; **McMurray v. Board of Education,** 216 Ala. 144, 112 So. 644.

I am of opinion therefore that it is the duty of the county governing body to determine what is reasonable compensation for the services of the tax assessor rendered under Code 1940, Tit. 51, §§ 66, 67; and likewise that such body for such purpose may consider whatever evidence it deems material.

On the other hand there is no reason why you may not present a claim for what you consider reasonable compensation for your services, and offer in support thereof such evidence as you deem material; but the order or judgment of the county governing body will ordinarily be final and conclusive, unless, as already stated, the compensation allowed is so grossly inadequate as to indicate "that the board failed to exercise a legal discretion."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 22, 1943.

Hon. James Swedenburg,

Superintendent of Education,

Pickens County,

Carrollton, Ala.

1. "Office of Profit"—within meaning of § 280 of Constitution of 1901 must have definite term.

2. "Office of Profit"—§ 280 of Constitution means pecuniary profit.

3. General Acts, 1943, No. 586, H. 256—Segrest, creating office of County Service Commissioner does not create office of profit.

4. Alderman serving without pay not holding "Office of Profit".

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion bearing date of August 14, 1943, is as follows:

"A member of the Pickens County Board of Education was recently appointed, by the Court of County Commissioners of the county, as County Service Commissioner. The appointment being made under the authority of bill passed at the 1943 session of the Legislature of Alabama and designated as follows:

" 'No. 586) An Act (N256—Segrest'

"I would like to have you advise me whether or not such member of the board, if he accepts the appointment above mentioned, thereby disqualifies himself from holding the position of Member of the County Board of Education.

"Another member of the County Board of Education was elected and is now serving as an alderman of an incorporated town in Pickens County, Alabama, but I am advised that he draws no salary or other remuneration for his services as such alderman. I will appreciate you advising me whether or not the acceptance of the office of alderman, under such circumstances, renders such member ineligible to hold the office of Member of the County Board of Education.

"If you can do so, will appreciate you advising me about these inquiries prior to the first of September."

Your questions may be phrased as follows:

1. Is the position of County Service Commissioner (Gen. Acts, 1943, No. 586, H. 256—Segrest) an "office of profit" within the meaning of Section 280 of the Constitution of Alabama, 1901?

2. Is the position of Alderman of an incorporated town an "office of profit" within the meaning of Section 280 of the Constitution of Alabama, 1901, when the person serving as Alderman draws no salary or other remuneration from his employment as Alderman?

In my opinion your first and second questions must be answered in the negative.

Section 280, Constitution of Alabama, 1901 provides:

"Sec. 280. No person holding office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

Title 41, Section 5 (7), Code of Alabama, 1940 provides:

"§ 5 (7). No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

It has been decided by the Attorney General that a member of the County Board of Education holds an "office of profit" within the meaning of § 280 of the Constitution. Report Attorney General, 1926-1928, page 462.

The rule for determining whether a position is an "office of profit" within the meaning of Section 280 of the Constitution has been stated in **State ex rel Glenn v. Wilkinson,** 220 Ala. 172, 124 So. 211 as follows:

"On further and more mature consideration, we are of the opinion, and so hold, that any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the state, the term and salary or perquisites of which are fixed by law, is an office of profit within the purview and meaning of Section 280 of the Constitution of 1901. **State v. Sanders,** 187 Ala. 79, 65 So. 378, L. R. A., 1915 A, 295."

It is to be noted that in the Glenn case, supra, the Supreme Court decided that the office of Assistant City Attorney was not an "office of profit" within the meaning of § 280 of the Constitution. In making this decision our Supreme Court cited the Sanders case, supra, which case involved the construction, not of § 280 but of § 281 (prohibiting salary increase during the

term of office). The decision in the Sanders case had held that since the statute fixed no definite term for the office or position there discussed, it would be impractical to apply the prohibition of § 281 against a salary increase or diminution "during the term." (See § 281, Constitution of 1901).

However, in the Glenn case (construing § 280) the Supreme Court said that the statute fixed no term and that therefore, the office of Assistant City Attorney was not an "office of profit" within the meaning of § 280. Thus it is clear that, according to the rules set out by the Supreme Court, a position to be an "office of profit" within the meaning of Section 280 must have a definite term. **Quarterly Report, Attorney General,** Volume XX, page 139; **Quarterly Report, Attorney General,** Volume XVII, page 302; **Quarterly Report, Attorney General,** Volume XV, page 350.

The position created by General Acts, 1943, No. 586, H. 256—Segrest, has no definite term. Section 2 of said act provides:

" *** and shall hold office at the discretion of said board *** ."

It follows that the office of County Service Commissioner is not an "office of profit" within the meaning of § 280 of the Constitution as construed by the Supreme Court of Alabama.

Neither do I find that the office of member of the County Board of Education and County Service Commissioner are incompatible. Therefore, one person may be a member of the County Board of Education and also County Service Commissioner at the same time.

In an opinion of this office to the same addressee on August 6, 1943 the following statement was made:

> "It is not necessary that an office have a fixed term to make the person holding that office an officer within the meaning of Section 280 of the Constitution.

This statement was not necessary to the decision then rendered and is hereby expressly withdrawn.

It is stated that a member of the County Board of Education holds the office of Alderman in an incorporated town but receives no salary or other remuneration for the services performed as Alderman. In my opinion "office of profit" as used in Section 280 of the Constitution means "pecuniary benefit" or monetary consideration. Therefore, an Alderman receiving no salary or other compensation does not hold an "office of profit" under Section 280 of the Constitution.

It is also my opinion that the office of Alderman without pay and member of the County Board of Education are not incompatible positions and

that, therefore, the same person may at the same time hold both.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 24, 1943.

Hon. Ben C. Morgan,

Director of Conservation,

Department of Conservation,

Capitol.

Department of Conservation—Fees—Licenses—Title 8, Sections 42 and 43, Code 1940—Act No. 304, General Acts of Alabama 1943.

1. The Director of Conservation is authorized to appoint persons not residing at the county seat for the purpose of issuing hunting and fishing licenses.

2. Such persons are entitled to a fee for the performance of such duties except when they are paid a salary therefor, in which case such fee is paid into the general fund of the county, and the remaining balance remitted to the Department of Conservation.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion bearing date of September 16, 1943 is as follows:

"Under the authority contained in Section 42 of Title 8 of the 1940 Code of Alabama, the Director of Conservation is empowered to appoint special agents in the various counties, other than the county seat, to issue licenses, under the provisions of Chapter 2 of said Code. Section 43 of said Title provides for fees for the Judges of Probate and other license issuing officers with specific disposition of the fees so collected.

"Section 43 of Title 8 was amended by Act No. 304, H. 238 by Sanderson, Regular Session 1943, and approved by the Governor on June 28, 1943, and provides in part as follows: 'Judges of Probate and other persons authorized and designated to issue licenses shall retain out of the money received for each license issued, the following amounts . . . . provided, however, that all such fees collected by any Probate Judge, license

commissioner, or other official, who is paid a salary for the performance of his duties shall be paid into the County Treasury to the credit of the general fund . . . . '

"I would like to have your official opinion stating whether or not the Director of Conservation is still empowered to appoint special agents in places other than the county seats for the purpose of issuing hunting and fishing licenses and whether or not they as such special agents are entitled to receive for their personal compensation the amount provided for by law as fees for this duty.

"If your opinion is to the effect that the special agents are entitled to retain their fees for issuing licenses, please advise if the Department of Conservation must then cover into the general fund of the county in which the special agents are appointed an amount equal to the amount retained by said special agents as their personal compensation."

In answer to your first inquiry it is my opinion that the Director of Conservation is still empowered to appoint persons not residing at the county seats for the purpose of issuing hunting and fishing licenses. This authority is granted by Title 8, Section 42, Code 1940, and is not altered, amended, or revoked by Act No. 304, H. 238, General Acts of Alabama, 1943. The said Act No. 304 merely pertains to the disposition of the proceeds from such licenses and is expressly applicable to "Judges of Probate and other persons authorized and designated to issue such licenses", thus indicating that the appointing power is provided for in other statutes. Therefore, the authority granted the Director of Conservation in Title 8, Section 42, Code of 1940 is unchanged.

That persons appointed in places other than the county seats for the purpose of issuing hunting and fishing licenses are entitled to compensation therefor is unequivocally expressed in the said Act No. 304 providing for a fee of fifteen cents for each license issued, such fee to be paid to Judges of Probate and other persons authorized and designated to issue licenses except when such persons are paid a salary.

Your second inquiry is answered in the negative. There is no provision of law requiring the Department of Conservation to remit to the general fund of each county an amount equal to the fees retained by persons issuing licenses.

Before the passage of Act No. 304, Title 8, Section 43, Code 1940, required such persons to remit to the Department of Conservation the remaining balance of the revenue from licenses after deducting their fee, or, if such persons were paid a salary, they were directed to remit the entire amount to the Department of Conservation to be covered into the Conservation Fund. The only change wrought by Act No. 304 is that when such persons are paid a salary, the fees they would otherwise collect are paid into the general fund of the county, and the remaining balance remitted to the Department of Conservation.

Thus, whereas formerly there was covered into the Conservation Fund not only the balance remaining after the deduction of fees, but also the entire amount collected when the persons issuing the licenses were on a salary

basis; now there is covered into the Conservation Fund only the balance remaining after the deductions of fees, such fees to be paid to the person issuing the licenses, or, if he be on a salary basis, to the general fund of the county.

Therefore, the only effect of Act No. 304 is to grant to the several counties the fees collected by persons issuing the licenses when they are on a salary basis, rather than grant such fees to the Department of Conservation.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 27, 1943.

Hon. R. E. King,

Tax Collector,

Mobile County,

Mobile, Alabama.

Mobile County—Tax Collectors—Tax Assessors—Assessments—Act No. 10, page 92, Local Acts of Alabama 1943—Title 51, Sections 62, 63, 200, 250 and 251, Code of 1940.

1. Where a taxpayer assesses more than one parcel of land, the Tax Collector is authorized to accept payment of taxes for less than the total number of parcels only when such parcels have been listed and valued separately.

2. In the event of such payment it is the duty of the Tax Assessor to furnish the Tax Collector his assessment lists in order to supply the information not included in the abstracts.

3. As the information in the book of delinquent taxpayers furnished the Probate Judge by the Tax Collector must conform to the assessment lists, it is the duty of the Tax Assessor to place at the disposal of the Tax Collector such assesment lists.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion bearing date of September 3, 1943 is as follows:

"There was a Local Act passed by the 1943 Session of the Legislature and approved by the Governor, excusing the Tax Assessor of Mobile County from making a Book of Assessments, and in lieu thereof, just make an abstract for the Tax Collector. I have been unable to secure a printed copy of this Act, however, I am quoting below the advertised copy.

AN ACT

"To relieve the Tax Assessor of Mobile County, Alabama, from the duty of preparing a book of assessments, and in lieu thereof arrange in alphabetical order the original assessment lists and have same permanently bound and kept as a permanent record and prepare tax collector's abstracts from such assessment lists.

"Be it Enacted by the Legislature of Alabama:

"Section 1. That the Tax Assessor of Mobile County, Alabama shall not be required to prepare a book of assessments, but in lieu thereof shall be required to arrange in alphabetical order the original assessments lists and cause the same to be permanently bound and such assessment lists when bound shall constitute the book of assessments to all intents and purposes. Such assessment lists when bound shall be preserved permanently as a matter of record and the collector's abstracts shall be prepared direct from the assessment lists.

"Section 2. That all laws and parts of laws that conflict with this Act are hereby repealed.

"Section 3. That this act shall be effective on its approval by the Governor. (End of quote)

— — — — — —

"This Act is intended to repeal H 449, Sossaman, Extra Session 1933, approved April 19, 1933.

"Due to this new Act, the abstracts as furnished the Tax Collector does not show any descriptions, but simply the name of the property owner, the amount of assessment, the amount of Homestead Exemption and amount of taxes in the one gross sum, whether the assessment covers one or more parcels of land. In other words, everything is shown in one total for each assessment, regardless of the number of separate parcels.

"I will greatly appreciate you rendering me an opinion on the following questions.

"First. Where an assessment covers more than one piece or parcel of land, can a separate bill be given to different parties, or to the original owner, for one or more parcels or must the entire bill be paid in one payment.

"Second. If you should rule that the bill does not have to be paid as a whole, keeping in mind the fact that the Tax Collector does not have any description or separate amounts on the separate items, and the Tax Assessor's and Tax Collector's offices are not in the same room, whose duty is it to furnish the Tax Collector with the Assessment Number, the owner's name as assessed, the description of the property, the amount of the assessment, whether or not a Homestead Exemption was granted, and if so, the amount granted, amount of personal property, amount of penalty, if any, the amount of the Municipal taxes, if any, and whether or not there is an Assessor's fee on the item in question.

"Three. As you know, after January 1st, of each year, and not later than March 1st, the Tax Collector must furnish to the Probate Court a list showing the name of the owner, a full description of the delinquent property with the amount of past due taxes, and the amount of all costs up to the date of sale. Does it become mandatory on the Tax Assessor to turn over to the Tax Collector's office, the assessments lists in order for the Tax Collector to complete the work as prescribed by law, as the duty of the Tax Collector? For your further information, at this time of the year, January 1st, our delinquents run between 4000 and 5000 assessments.

"I will certainly appreciate, and do thank you in advance, for your usual prompt attention to the above request."

Your questions are answered in the order in which they are presented in your request.

Your first inquiry as to whether an assessment covering more than one parcel of land must be paid to the Tax Collector in one payment or whether individual payments can be made for different parcels or by different parties is answered by reference to Title 51, Section 200, Code of Alabama, 1940, which provides as follows:

"Payment when parcels of real estate listed separately.—Any person listing for assessment more than one piece or parcel of real property which has been listed and valued separately may pay taxes on any one or more of said pieces, provided, however, that he shall first pay taxes on all personal property listed by him in said assessment."

This statute authorizes you to accept the payment of ad valorem taxes for any number of parcels less than the total number assessed for taxation only when such parcels have been listed and valued separately. Therefore, unless these conditions are complied with it is your duty to collect the total amount of taxes due.

In regard to the acceptance of payments of taxes due on such parcels of land by different parties, the same rule will obtain, with the further provision, however, that a bill or receipt for such taxes must be in the name of the party against whom they are assessed.

Your second inquiry presents for consideration whether, under circumstances in which payment of taxes on a portion of the property assessed may

be made, it is the duty of the Tax Assessor to furnish the Tax Collector with his assessment lists in order to supply the information necessary for the ascertainment of the description of that portion of the property on which taxes are sought to be paid, the amount of the assessment, whether or not a Homestead Exemption was granted and the amount of any penalties or fees due on such portion, or whether the Tax Collector has the duty of obtaining this information from the Tax Assessor. It is my opinion that the Tax Assessor has the duty of furnishing his assessment lists to the Tax Collector for the determination of this information.

Prior to the enactment of Act No. 10, H. 92, Local Acts of Alabama 1943, the statute quoted in your request, it was the duty of the Tax Assessor to compile from his records a book of assessments, and therefrom make a complete abstract of all assessed property, the amount of taxes thereon and exemptions thereof, a copy of which abstract was furnished the Tax Collector. Furthermore, as provided in Title 51, Section 63, Code of 1940 such book of assessments was examined and the correctness thereof certified to by the Department of Revenue, such certificate being the warrant to the Tax Collector to proceed to collect such taxes.

It appears from Title 51, Section 62, Code of 1940 that when the use of assessment lists in lieu of a book of assessments is permitted by statute, such assessment lists shall constitute the book of assessments and the certificate of the Department of Revenue shall be entered upon such assessment lists, from which the Tax Assessor shall prepare his abstract for the Tax Collector.

The foregoing statutory provisions evidence a Legislative intent that the Tax Assessor shall place at the disposal of the Tax Collector his assessment lists for the ascertainment of information not included in the abstract. This intent is positively indicated by the provision of Title 51, Section 63, Code of 1940 that the certificate of the Department of Revenue, when attached to the book of assessments, or the assessment lists, as is the case here, is the warrant to the Tax Collector to proceed to collect the taxes.

It is my opinion, therefore, that the Tax Assessor must furnish the Tax Collector with the assessment lists under such circumstances as are set forth in your second inquiry.

Your third inquiry is answered in the affirmative. Title 51, Sections 250 and 251, Code of 1940 require the Tax Collector to prepare a book in which he shall enter each parcel of property assessed to any person upon which taxes are not paid, which book shall set forth the property and taxes in the same manner as they are described in the assessment lists, with the amount of unpaid taxes, penalties, fees, and the amount of state and county taxes due, such book to be delivered to the Judge of Probate on or before the first day of March. It is my opinion that the requirement that the description of the property and amounts due conform to such descriptions in the assessment lists imposes upon the Tax Assessor the duty of supplying the Tax Collector with the assessment lists. A contrary conclusion would render im-

possible the performance of this duty by the Tax Collector.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 27, 1943.

Hon. S. P. Poyner,

Judge of Probate,

Houston County,

Dothan, Alabama.

Act No. 315, H. 520, approved June 28, 1943—Code 1940, Title 51, § 463—Licenses—Motor Vehicle Dealers—

1. Code 1940, Title 51, § 463, as amended by Act No. 315, H. 520, approved June 28, 1943, unconstitutional in so far as it applies to out-of-state dealers, with no established place of business in the State, soliciting orders for the purchase of motor vehicles, by display or demonstration of samples within the State, where such orders are to be filled and delivery made from outside the State to purchasers within the State.

2. There is no constitutional objection to Subdivision (b) of said Section 463, as amended, imposing license tax on sales or offers to sell at auction.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of August 26, 1943, is as follows:

"Kindly refer to Act No. 315, House Bill 520 as passed by the 1943 Legislature and approved June 28, 1943. Sub-Sec. (a) is identical with Sec. 463 Tit. 51 of the 1940 Code. Sub-Sec. (b) is the new part and deals with a License on Auction Sales of Motor Vehicles.

"Section 463 was declared unconstitutional by our Supreme Court in the case of State vs. Kimbrough 3 So. (2nd) 424 and a confirmation of said unconstitutionality of that office was under date of October 8, 1941 in a letter addressed to me.

"Kindly confirm or over-rule your former ruling with reference to Sub-Sec. (a) of Section 463 Tit. 51. In addition kindly rule on the constitutionality of Sub-Sec. (b). Since it is an addition to an Act formerly held unconstitutional without the benefit of a new or amended Title, it is my opinion that Sub-Sec. (b) cannot stand.

"Since Privilege Licenses will soon become due, I will thank you for an immediate reply."

In **Best and Company, Inc. v. A. J. Maxwell, Commissioner of Revenue for the State of North Carolina,** 311 U. S. 454, 85 L. Ed. 274, the Supreme Court of the United States, considered a North Carolina statute imposing an annual privilege tax of $250 upon persons, not "regular retail merchants in the State of North Carolina" displaying merchandise for the purpose of obtaining orders therefor in hotel rooms or other places rented or occupied temporarily. Said the Court:

"In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

After showing that the practical operation of the statute was that out-of-state merchants who displayed their wares by sample for the purpose of obtaining orders for shipment into the state from without the state would necessarily compete with resident merchants who were required to pay only a nominal tax in order to do business in the same way, the court further said:

"Interstate commerce can hardly survive in so hostile an atmosphere. A $250 advance required of out-of-state retailers but not of their real local competitors can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market. ***

"The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language."

Code 1940, Title 51, Section 463, as amended by Act No. 315, H. 520, approved June 28, 1943, in Subdivision (a) imposes upon dealers in motor vehicles without "a regular established place of business in this State for the sale of such motor vehicles," an annual license tax of $200 for the use of the State and $100 for the use of the county in each and every county wherein such a dealer may engage in business; whereas under the immediately preceding section of said Title 51, other dealers, presumably with established places of business in the State, may engage in the same kind of business referred to in said subdivision (a) of section 463, as amended, by payment of an annual license tax ranging in amount from $140 down to $30, depending on the population of the city or town wherein such business is established. Clearly, therefore, an out-of-state dealer desiring to engage in business in Alabama by display or demonstration of motor vehicles for which he takes orders to be filled by delivery to the purchaser from outside the State would compete with state-established dealers at a disadvantage, although nominally

section 463 applies to dealers both within and without the State who have no regularly established places of business in the State from which to operate.

The practical operation and effect of that part of the statute to which reference has been made is to discriminate against interstate commerce. I am of opinion, therefore, that on the authority of **Best and Company v. Maxwell,** supra, the statute is to this extent unconstitutional as obnoxious to the commerce clause of the federal constitution.

Subdivision (b) of said Section 463, as amended, imposes an annual license of $500 for the State and $500 for the county in each and every county of the State in which dealers in motor vehicles sell or offer to sell such vehicles at public auction, without reference to residence or non-residence, and without any other qualification whatever, so that part of the amended statute does not, in my opinion, operate to discriminate between intrastate and interstate business. Under that part of the statute any dealer who sells or offers to sell at public auction, whether or not he has an established place of business in the State, would come within the purview of the statute. I see, therefore, no objection to the validity of that part of the statute which imposes the auction-sale tax.

I am unable to find any decision of our court of last resort construing Code 1940, Title 51, Section 463. Subdivision (b) of the amended statute is germane or pertinent to the subject matter of subdivision (a) as it appears in the Code, and inasmuch as said section 463 as it appears in the Code has not been declared unconstitutional by our Supreme Court there is no occasion to consider the proposition to which you refer, that an addition by way of amendment to an unconstitutional statute is itself, for that reason, unconstitutional.

In conclusion, I am of opinion that subdivision (a) of the amended statute is unconstitutional in so far as it applies to out-of-state dealers who come into the State and take orders for delivery of motor vehicles to be filled out of the State; and that, as above indicated, there is no constitutional objection to subdivision (b) imposing the license tax upon sale of such vehicles by auction.

The case of **State v. Kimbrough,** 3 So. (2nd) 424, to which you refer did not construe section 463 and in my opinion is not material in this connection. In that case the Supreme Court held unconstitutional an entirely different statute (Code 1940, Title 36, Sections 104-107) requiring dealers in used cars brought into this State from without the State to file a bond and pay a tax with reference to each such car sold or offered for sale within the State. Accordingly the opinion of this office, to which you refer, dated October 29, 1937, to Hon. Frank M. Johnson, Judge of Probate, Winston County, (Biennial Report, Attorney General, 1936-38, page 443) should in the future be disregarded.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 28, 1943.

Hon. H. G. Dowling,

Commissioner of Revenue,

Capitol.

TAXATION—

Refund Excess Sales Tax—

1. The Department of Revenue is without authority to credit excess payment by a taxpayer against a subsequent sales tax when it becomes due.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of September 21, 1943 is as follows:

"Section 781, Title 51 of the 1940 Code of Alabama, reads as follows, I quote:

"'Department to promulgate rules.—The department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.'

"The Department of Revenue has promulgated, under the terms and provisions of the above quoted statute, Sales Tax Regulation No. 19, which reads as follows, I quote

"'Sales Tax Regulation No. 19

"'In cases where the Department, on examination of the return made by the Taxpayer, ascertains that the amount of tax paid for any period is greater than the amount due as shown by the return, as authorized and provided by Section 763 of the Alabama Sales Tax Act, such excess shall be refunded to the Taxpayer (a) upon the filing by the Taxpayer of a written request for such refund executed in such form as may be required by the Department; (b) such excess may be refunded to the Taxpayer by means of a certificate of refund issued by the Department to be attached to the next return made by the Taxpayer under said Act, and treated as a deduction from the amount of tax due upon such subsequent return, or (c) such excess may be refunded by crediting the amount thereof on any deficiency of tax then due by the Taxpayer under the provisions of

said Act.

" 'No refund hereunder shall be made unless made or application therefor is filed within two years from the date of the payment of such excess.'

"Will you kindly advise this Department if it has authority of law to refund erroneously paid taxes by permitting the taxpayer to take credit upon subsequently accruing taxes, in the manner suggested by Regulation No. 19, in lieu of refunding such taxes in the manner authorized by the provisions of Section 913, Title 51, of the 1940 Code of Alabama."

Title 51, Section 913, of the Code referred to in your letter is intended for the benefit and relief of the taxpayer by providing for him a remedy in all cases where he has actually paid an excessive and erroneous amount of tax to the Revenue Department. This section grants no authority to the Department to make refunds or give credits to the taxpayer other than as therein provided.

Section 781, Title 51, noted in your letter, has been amended by the Legislature of 1943 (Act No. 545—H 498). The original section is not changed but the amendment makes additions thereto not affecting the question here involved. This section, 781, is found in the Code article dealing with sales tax and applies only to such tax. It is not dealing with the question of refunds or excessive payment of excise tax. The next section, 782, of Title 51, does deal with that subject. It fixes the authority of the Department where it is determined by the Department that an excessive amount has been paid. It grants no authority to the Department to credit the excessive amount paid or any part thereof to subsequent taxes becoming due.

We find that Section 640, Title 51, of the Code, dealing with oils, etc. has been amended by the Legislature of 1943, so as to authorize the Department of Revenue to credit excess payments upon the amount of taxes due for any subsequent monthly period or it may, if it sees proper, refund the same under the provisions of Section 913, Title 51, of the Code. Act No. 472—H. 594. Section 658, Title 51, dealing with tax on gasoline and other oils has been amended by adding the provisions made by the amendment to Section 640. Acts 1943, No. 773—H. 593.

We have been unable to find any amendment of Section 782, Title 51, so it must control, however desirable an amendment might be. This section 782, provides that if, upon examination by the Department, it is determined that an amount of tax has been paid in excess of that properly due then the amount in excess shall be credited **against any amount thereof then due from the taxpayer** and that any balance of such excess shall be returned to the taxpayer by certificate of overpayment issued by the Department of Revenue.

The Department of Revenue is a creature of the legislature, and its powers are and can be conferred only by the legislature. The fact that the legislature saw fit to make the amendments to the sections above referred to furnishes a reasonable presumption that it intended that Section 782, supra, should stand as it is written. The legislature was dealing with kindred subjects, all to be found in Title 51, of the Code dealing with the question of

revenue.

Sections 781 and 782 must be construed together and when this is done it is manifest that the legislature did not intend to authorize the Department of Revenue to make and promulgate a rule that would nullify Section 782. It must follow that the Department of Revenue as to sales tax has no authority to credit the excess tax over the amount determined to be due against taxes subsequently becoming due, nor has it authority under Section 781 to pass any rule granting such authority.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 29, 1943.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Capitol.

Judge of the County Court of Russell County cannot issue warrant against the "County Court Fund" for expenditures other than his or a substitute Judge's salary.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion dated September 21, 1943, is as follows:

"Please refer to Act 39, page 22, Local Acts of 1936-1937, and particularly to Section 10 of the said Act and advise me in answer to the following:

"Does this Local Act authorize the Judge of the County Court of Russell County to make disbursements out of the County Court Fund on warrants issued by him for stationery, office supplies, et cetera?

"It appears that the Local Act confines the authority of the Judge of the Court as to the issuing of warrants against the County Court Fund to the payment of his salary, and to the payment of the salary of a special judge to act in his stead, as provided in Section 13 of said Act. It appears probable that the County Commission would control all other disbursements from the County Court Fund."

The authority of the Judge of the County Court of Russell County is strictly statutory and limited to warrants for the payment of his salary and to the payment of a special judge acting in his stead.

Section 10 of the Act creating the County Court of Russell County is as follows:

> "§ 10. The maintenance of said court shall be the same as provided by law for the maintenance of County Courts, except that any amounts expended therefor shall be paid out of the said County Court fund."

Under the provisions of Title 13, Section 313, 1940 Code the Probate Judge is ex officio judge of the county court and the authorization for furnishing him with stationery, etc., is found under Title 12, Section 123 which is as follows:

> "§ 123. Stationery of officers paid for by county. The judge of probate, *** must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, *** "

It necessarily follows that the maintenance of the County Court of Russell County, including the purchase of necessary stationery, books, and postage stamps used exclusively for official business shall be paid for by the county on approval of the court of county commissioners, board of revenue or other like governing body, excepting that such payment should be paid from the "County Court Fund" and not from the general fund.

Authority for such expenditures is statutory and I am unable to determine the articles you include in the phrase "office supplies, et cetera," and therefore, must limit this opinion to the articles and services specifically enumerated in Title 12, Section 123, 1940 Code, supra.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 29, 1943.

Hon. Hayse Tucker,
Director of Finance,
Capitol.

Appropriations—Armory Commission—Military Department—Title 35—Title 55, Chapter 4, 1940 Code of Alabama.

1. Appropriations to Military Department shall be paid out on warrant of Comptroller same as other State Departments, and not in **lump sum.**

2. Funds of Military Department, including monies of Alabama Armory Commission, remain in State Treasury.

3. Balances in appropriations to Military Department at end of fiscal year revert to General Fund; **Except:**

4. Balance in allotment for quarterly allowances designated for specific building project, etc. may be placed in 'Armory Fund' and shall not revert at end of year.

5. Present funds in Military Department to credit of Armory Commission should be placed in State Treasury in General Fund at end of fiscal year; except income from rental of armories and funds designated for building projects, etc.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your request for an official opinion, dated September 23, 1943, is as follows:

"The Military Department of the State of Alabama has on deposit in certain banking institutions in the State of Alabama in appropriate accounts moneys appropriated to the department, moneys accumulated over a period of years derived from unexpended balances of such appropriations, and from rents. These accounts are in the name of and handled by the Armory Commission.

"Please render your official opinion on the following questions:

"1. Can the quarterly allowances appropriated to the Military Department as provided in the general appropriation bills, since 1931, be paid over to the Military Department in lump sum payments each quarter and held and disbursed by such department contrary to the provisions of Title 55 Chapter 4, Code of Alabama, 1940?

"2. Can any appropriation to the Military Department of the State

of Alabama be handled in such manner?

"3. Should all unexpended balances, whether remaining in banking institutions to the credit of any account in the Military Department or whether remaining in the State Treasury, revert to the general fund at the end of each fiscal year?

"Your attention is directed to the following code sections in consideration of these problems: Title 35 Sections 158, 180, 184, 185 (as amended, see pocket parts), 190, 198, 199, 201; Title 55, Chapter 4, particularly Sections 103 and 104. See also quadrennial report of Adjutant General 1942, also general appropriation bills 1931, 1935, 1939, and 1943. It is further suggested that Mr. R. D. Fowler of Department of Finance be consulted relative to further understanding of the questions propounded herein.

"It is desired that this opinion be rendered prior to October 1, 1943, end of this fiscal year."

Receipt of copy of audit of the Military Department, of copy of order of the Governor, as Commander in Chief of the Military and Voluntary Forces of the State of Alabama, directed to the acting Adjutant General and copy of the Quadrennial Report of the Adjutant General 1942, is hereby acknowledged. The directive from the Governor reads as follows:

"1st. That all funds in the care and custody of the State Military Department and the Armory Commission be kept on deposit with the State Treasurer.

"2nd. That the Adjutant General, or in his absence, the Acting Adjutant General, of the State Military Department, immediately transfer all funds in the care and custody of the State Military Department, including the Armory Commission funds, into the State Treasury.

"3rd. That all allowances and appropriations by the State and all deposits with the State Treasurer for the State Military Department and the Armory Commission be paid out by the State Comptroller on individual claims, properly made out, itemized, sworn to and approved by the Finance Department, as in the case of all other State expenditures.

"This the 20th day of August, 1943.

/s/ Chauncey Sparks,

Governor and Commander-in-Chief of the Military and Voluntary Forces of the State of Alabama."

The second interrogatory propounded in your request embraces the first question listed, and they shall be treated as one; viz:

"Are the appropriations to the Military Department to be expended in accordance with the provisions of Chapter 4 of Title 55 of the 1940 Code of Alabama?"

The answer to this question is in the affirmative.

It is the manifest intention and clear purpose of Title 55, Chapter 4, Code of 1940, to regulate the expenditures of the State Departments as outlined therein, and only those departments and bureaus specifically exempt from the operation of the statutes would not be required to conform to the provisions. The military Department is not specified as exempt, and there is no provision in the Military Code authorizing the payment of any appropriation to that department in a 'lump sum'. Hence, it is necessary to look to the general provisions as contained in Chapter 4, supra, to determine the method of disbursement.

An examination of the sections of Title 35 of the 1940 Code of Alabama pertinent to the financial operation of the Military Department discloses as follows:

" *** He (adjutant general) shall perform such other duties as may be required of him by the commander-in-chief, and the comptroller of Alabama shall draw warrants on the treasury for all expenses incurred under this section on bills regularly presented to, and approved by, the governor. *** "

"158. **Maintenance appropriation for headquarters and organizations.** —In commutation of the maintenance expenses which each headquarters and organization of the national guard and naval militia of Alabama bears in providing by purchase, rent, building or otherwise procuring office room, drill room, and drill areas and other rooms and areas for instruction, drill, and training purposes, and a safe place for the keeping of supplies, military equipment of every character, arms and ammunition and animals, and in defraying all expenses necessary and incident to the upkeep of the headquarters or organization, there shall be annually allowed to the commanding officer, or such other officer as the governor may designate, in each headquarters and organization maintenance allowance provided in the annual budget, such sums as the adjutant general may determine and the governor may approve, which sums shall be based on the administrative responsibility, the maintenance strength in officers, warrant officers, and enlisted men, and the initial value of the military property issued and in possession of the headquarters, detachment or organization; such allowance shall be paid quarterly: Provided; that there shall be paid to each band the sum of eighteen hundred dollars per annum: such allowances shall be paid monthly. For the purpose of making such payment to a band under the provisions of this section, a band shall be rated as a separate unit from the organizations of which it is a part or to which it may be attached. To secure such allowances for any month or quarter, as provided in this section, the commanding officer of the organization shall make application to the adjutant general; such application to be accompanied by a sworn statement of all receipts and disbursements for such period as the adjutant general may require; which statement shall be verified by vouchers showing evidence of payment of said money. Should the governor disapprove of any expenditure therein, it shall be deducted from the next quarterly or monthly allowance; provided; that any unexpended monies allowed any headquarters or unit in the national guard or naval militia of Alabama under the provisions of this section shall be available for the purpose of pur-

chasing grounds, buildings, repairing buildings, enlarging or otherwise changing buildings, purchase of uniforms, or for any other purpose that the adjutant general may approve."

I would be proper in view of the general principle of law, that all acts in pari materia should be construed together, to look to some of the other provisions for expenditures in this department, and in so doing your attention is directed to Section 180 of said Title 35, which provides for 'dropping allowances' and in pertinent parts provides as follows:

"Sec. 180. *** The funds expended as a dropping allowance shall be audited and accounted for in the same manner as other state funds which have been appropriated for military purposes; *** "

Section 183 of said Title also sheds light upon the manner in which money used for this department may be expended in providing as follows:

"Sec. 183. *** said revolving fund to be advanced, upon the approval of this chapter, out of the regular military appropriation provided in section 184 of this title, and to be reimbursed from time to time out of the fund against which the expenditure is properly chargeable, upon presentation to the comptroller of accounts, receipts and vouchers, with orders attached, approved by the governor, showing the legal expenditure of the amount sought to be reimbursed."

Section 70 of said Title providing for the payment of salaries of officers and employees of this department and Section 117 of said Title providing for the pay of men engaged in active military service of the State, also definitely indicate that military 'money' shall take no other form of expenditure than that prescribed in Chapter 4, Title 55, supra.

Section 184 of Title 35, 1940 Code of Alabama provides as follows:

"Sec. 184. **Regular military appropriations.**—The legislature of Alabama shall appropriate during each of its regular sessions, or during such other sessions as conditions may require, a sufficient sum of money, based upon estimates and recommendations of the adjutant general and approved by the governor, for the purpose of defraying the expenses of the military department in carrying out the provisions of this chapter, and such other expenses *** . The governor shall prescribe necessary rules and regulations governing the manner and method of disbursing moneys authorized by this section to be appropriated, and all expenses authorized to be contracted shall be certified to and verified by affidavit, with itemized vouchers and orders attached. Any portion of any item of any regular appropriation for the support of the military department and state militia which is unexpended and unobligated after the expiration of the eleventh month of any fiscal year shall be available for use in taking care of any expenses of operating the military department for which the regular appropriation shall be insufficient for that fiscal year."

Said section, supra, includes all appropriations to the Military Department and the provisions that such appropriations shall be expended in the manner and method prescribed by the Governor, after the certification and

verification by oath, fortifies the position that there is no exemption to the operation of Chapter 4 of Title 55 contained in the appropriation statutes of the Military Department.

Section 185 as amended (See Pocket Parts, Title 35, 1940 Code of Alabama) is the last expression of the Legislature defining an expenditure of a military appropriation. Said Section 185 provides in pertinent parts as follows:

> "Sec. 185. ** The disbursement of all funds appropriated by this section shall be on vouchers approved by the adjutant general and the governor."

The several acts referred to herein prescribe and define the appropriations therefor and for what purpose and intent that certain fund may be used but the method of the expenditure is left to the provisions of Chapter 4, Title 35, supra, and the order of the Governor, supra, reinforces and makes mandatory the expenditures of this department through the office of the Comptroller in the regular course of state disbursements.

Your question number 3, dealing with unexpended balances remaining in the Military Department, requires an examination of the copy of audit of the department submitted with your request in which two funds of the Military Department are set out.

The account entitled the "Armory Commission Regular Account" appears to be a fund on deposit in a banking institution in the State of Alabama, and this fund, totaling some $46,000, is made up from unexpended balances from various military appropriations, including a transfer of the appropriation to the Aviation Service Building Commission to the Armory Commission and balances remaining at the end of a fiscal year from an appropriation to the Military Department. The other fund or account "Armory Commission Maintenance and Operation Account," totaling some $39,000 on deposit in a banking institution in the State of Alabama, appears to have been made up from appropriations to quarterly allowances, as set up and credited to the various military units over the State and income from the rental of armories for temporary hire and from leases. This account also received, transfers from other funds of the military department when needed to defray expenses.

For the purpose of this opinion, it is assumed that the apropriations to the Military Department were properly transferred to the Armory Commission upon order of the Governor by virtue of his authority, as provided in Section 190 and Section 201 of Title 35, which sections authorize the Governor to make such transfer of any moneys appropriated to the Military Department, for any purpose, to the Armory Commission.

(The operation and maintenance of the Alabama National Guard, now Alabama State Guard Units was properly delegated to the Executive Committee of the Alabama Armory Commission and the Adjutant General by appropriate resolutions of the Armory Commission—See Quadrennial Report Adjutant General 1942, pages 231 and 237.)

The Armory Commission of Alabama was incorporated as a body corpor-

ate pursuant to Act No. 276, S. 362, 1935 Acts of the Legislature, page 672, which act, as amended by the 1939 Legislature, was brought forward in Chapter 2, Title 35, of the 1940 Code of Alabama. The intent and purpose of this corporation was to finance and refinance armory units and buildings in the State and to care for and maintain these properties in the absence of the Alabama National Guard. There is no direct appropriation to this corporation, though there is a provision for an 'Armory Fund,' and in view of Sections 190 and 201 of said Title 35, wherein a transfer of Military appropriation may be affected, as outlined above, it is apparent that this fund be used for such transfers of moneys deemed necessary to maintain and operate the Military Department through this corporation. It further appears that any transfer of moneys appropriated to the Military Department, to this corporation, upon order of the Governor, shall be for the purpose of defraying any expenses accruing in the operation and maintenance of the Armory units, and only so much of such regular appropriation shall be transferred and disbursed by this corporation as shall be necessary to pay for the expenses and operations of same. Hence, no surplus or trust fund is contemplated out of such transfer, and any unexpended balance in either of the two funds under discussion herein, or, any unexpended balance in any appropriation to the Military Department, shall revert to the general fund in the State Treasury at the end of each fiscal year.

At this point it may be well to consider the source of funds to the Military Department. The general appropriation bill enacted at each session of the Legislature contains an appropriation 'for the Military Department,' and sets up several amounts to be used for various purposes. For instance, the 1939 Act provided:

> " *** 1. Military Department: For compensation of the Adjutant General $4,000.00. For other salaries $20,255.00. For other expenses $21,-250.00. For quarterly allowances $55,000.00, $100,505.00. For care and maintenance of State Armories to be expended under the direction of the Director of Finance, with the approval of the Governor, $18,750.00. For the Aviation Commission: (a) For compensation of the Assistant Director of Aeronautics $3,000.00. *** "

It may also be noted that the first paragraph of such bills contain the following expression:

> " *** to be paid out of any monies in the State Treasury not otherwise appropriated, the several sums of money hereinafter specified or so much thereof as may be necessary. *** "

Thus, it may be seen, the obvious conclusion is that appropriations to the Military Department are entitled to the same construction as that placed upon appropriations for other departments of the State. It would be beyond sound reasoning, to hold that such appropriations were not subject to proportionate decrease of allotment as provided in Title 55, Section 103.

However, the provisions of Section 158, supra, attempt to set aside unexpended balances from quarterly allowances for the purpose of purchasing lands, erecting buildings, and providing for permanent additions for armory units. It is my judgment that any part of such unexpended balance as may be designated for the purpose mentioned in said Section 158, conforming with

the provisions of Section 104, of Title 55, supra, may be carried over in an appropriate fund, namely, the Armory Fund, and shall not revert to the general fund at the end of the fiscal year. In order to carry out the meaning and intent of this section, it would be necessary for a specific amount and particular project to be announced at the expiration of the eleventh month of any fiscal year. Such designated sum and project shall require the approval of the Adjutant General and the Governor.

The audit accompanying the request indicates that certain rentals collected under the provisions of Section 191 of Title 35 of the 1940 Code (rents of a temporary nature inure to the benefit of the unit whose facilities were used) and rents collected under the provisions of Section 192 of said Title 35 (rents from lease or contract for use of armories for definite term shall be placed in the Armory Fund) were collected and co-mingled with other funds comprising the two accounts set out herein. According to the provisions of these two sections the temporary rents should be returned to the units entitled to same, and the other rents collected should be placed in the Armory Fund and used by the Armory Commission as other moneys in said Fund are used for the care and maintenance of Armories.

To summarize the conclusions of this opinion:

1. All appropriations to the Military Department of the State of Alabama shall be kept in the Treasury of the State of Alabama and expended upon proper requisition and affidavit and on warrants through the office of the Comptroller, and not by a lump sum or bulk payment.

2. All unexpended balances in any appropriation to the Military Department shall revert to the general fund at the expiration of each fiscal year except such portion of unexpended balance from quarterly allowances as shall be designated for the purchase of lands and buildings, etc.

3. All income from rents of Armories not payable to an individual unit should be placed in the Armory Fund or such fund established in the State Treasury in lieu thereof.

4. The Armory Fund, or such fund in lieu thereof, shall carry over all funds from year to year designated for purchase of lands and buildings, etc., and the same shall not revert to the general fund.

5. The money now held by the Armory Commission shall be placed in the State Treasury to the credit of the general fund, however, those funds legally constituting a part of the Armory Fund as set out in this opinion shall remain therein. (The rents payable to individual units should be returned to same).

The following authorities were considered in this opinion:

Quarterly Report of the Attorney General, Volume IX, page 41, opinion to Hon. Charles W. Lee, State Comptroller, October 22, 1937; Quarterly Report of the Attorney General, Volume XIII, page 27, opinion to Brigadier General John C. Coleman, October 20, 1939; Quarterly Report of Attorney General, Volume XVIII, page 208, opinion to Hon. B. M. Smith, February 14, 1940;

Quarterly Report of Attorney General, Volume XXI, page 47, opinion to Hon. Stewart J. Lloyd, October 17, 1940; Quarterly Report of Attorney General, Volume XX, page 329, opinion to Hon. A. R. Forsyth, September 25, 1940; 18 Alabama Digest, Key No. 181 (1) Statutes; Blumberg Shoe Co. v. Phoenix Assurance Company, Ltd., 84 So. 763, 203 Ala. 551; State v. Martin, 48 So. 847, 160 Ala. 190; City of Mobile v. Harker, 85 So. 425, 204 Ala. 26; Gulf State Steel Co. v. Justice, 87 So. 211, 204 Ala. 577; 18 Alabama Digest, Key No. 225, Statutes.

All opinions heretofore rendered on the questions presented herein are modified to conform to the conclusions expressed herein.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 29, 1943.

Hon. William W. Hill,

Judge of Probate,

Montgomery County,

Montgomery, Alabama.

Insanity—Insane Persons—Act No. 575, H. 421, approved July 7, 1943—Transportation Expenses—Code 1940, Title 15, § 432—Title 45, § 211—

1. Act No. 575, H. 421, approved July 7, 1943, applies only to Sheriffs, acting in person or by deputy, when deputed by the probate judge to convey insane persons to the State hospital, pursuant to Code 1940, Title 45, § 211, under proceedings authorized by Code 1940, Title 15, § 432 or Title 45, §§ 207-210.

2. As to other persons, so deputed, the Act is without application, and the expense of conveying indigent insane persons to hospital is regulated by Title 45, § 211, without reference to Act No. 575, H. 421, approved July 7, 1943.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of September 16, 1943, is as follows:

"The regular session of the Alabama Legislature, 1943, House Bill No. 421, passed an act to provide for fees and mileage paid to the Sheriffs of the several counties of Alabama. Section 1 of this Act states that the Sheriffs of the several counties of the State of Alabama shall receive 10c a mile in removing any such person to the State Hospital for the insane. In Montgomery County insane persons are not transported by the Sheriff. The County has appointed S. H. Butler transfer agent for the County to take insane persons to the State institutions for the insane.

"We are now asked the question if Montgomery County would come under this section and Mr. Butler's compensation should be 10c a mile. Mr. Butler's official capacity aside from being the transfer agent is a Court Deputy Sheriff. Montgomery County being on a salary basis and this Section stating the 'Sheriffs' leaves a doubt as to whether the 10c a mile would apply to the transfer agent.

"It is the custom now in this County to pay him 7½c per mile and he has called to our attention this act passed by the Legislature."

Whatever action Montgomery County may have taken appointing Mr. Butler "transfer agent for the county to take insane persons to the State institutions for the insane," pursuant to custom "to pay him 7½c per mile," was under the opinion of this office unauthorized. **Quarterly Report,** Attorney General, Vol. XIV, p. 15. In that opinion it was held that under Code 1923, § 1445 (Code 1940, Title 45, § 211) each case for "all necessary expenses incurred in conveying an indigent patient to the hospital" should "stand on its own footing," and that no uniform, invariable schedule for payment could be legally adopted by the county.

In answering your question therefore we may dismiss further consideration of the custom and of the appointment of a "transfer agent" in Montgomery County.

The body of Act No. 575, H. 421, approved July 7, 1943, is as follows:

"Section 1. The Sheriffs of the several counties of the State of Alabama shall receive for arresting and taking into custody any person charged with being of unsound mind the following fees and mileage: $5.00 for taking any such person into custody, and 10 cents per mile in removing any such person to a State Hospital for the insane; and such Sheriff shall also receive the same fees for feeding insane prisoners as are allowed by the State for the feeding of other State prisoners.

"Section 2. The fees and mileage provided for in Section one hereof shall be paid from the general fund of the several counties and shall be paid in the same manner and way as other claims against said fund are paid."

The act purports neither to amend nor to repeal any existing provision of law, and should not be construed as amending or repealing existing law unless in irreconcilable conflict therewith, under the familiar rule of construction that amendment or repeal by implication is not favored.

The legislative intent, in enacting this legislation, as declared in its title, was to prescribe "fees and mileage to be paid to the Sheriffs of the several counties of Alabama for taking into custody persons charged with being of unsound mind," and the intent, as declared in the body of the Act, was to provide such fees "for arresting and taking into custody" such persons, and the aforementioned mileage for "removing" them to a "State Hospital for the insane." Section 2 of the Act requires that such "fees and mileage" be paid from the county's general fund in the same manner as other claims are paid.

Upon search for other provisions of law relating to the expense of transportation of insane persons to hospitals for the insane, it will be found that express provision is made therefor with respect to insane prisoners or persons charged, convicted or acquitted of crime, under Code 1940, Title 15, § 431, which makes such expense a charge against the State in cases arising under Ch. 21, Art. 2, §§ 426-430 of Title 15. Evidently therefore the Act under consideration has no application to such cases.

Section 432 of Title 15, provides for arresting and taking into custody unrestrained and uncontrolled insane persons, who may thereupon be taken before the probate judge and committed to jail or the Alabama State hospitals pending further proceedings.

Sections 208-210, Title 45, relate to admission of insane persons to such hospitals upon application though the probate judge, who is required by Section 211 to "depute one or more persons, relatives, friends, or officers as he may see fit, to convey the patient to the hospital." Under said section the county is required to pay "all necessary expenses" only in the case of "indigent" patients.

In neither § 432, Title 15 nor § 211, Title 45 is there any limitation upon the amount of expense, including cost of transportation, payable by the county in case of indigents, not otherwise chargeable against the patient, his estate or those responsible for him.

Persons arrested and taken into custody under Title 15, § 432, are not of course charged with crime, although to quote the words of the recent act of legislature, they may be said to be "charged with being of unsound mind". The same observation applies as to persons admitted to the hospital under Title 45, §§ 207-210.

It is my opinion, therefore that under said Act the Sheriff, whether acting in person or by deputy, whenever deputed by the probate judge to convey an insane patient, not a prisoner, to the hospital, is entitled for his services or the services of his deputy, the aforementioned "mileage" as a fee or compensation for such services. And if the sheriff is paid a salary such fees of course should be covered into the county treasury.

This mileage under the express terms of the Act is payable only to the Sheriff, whether he acts in person or by deputy. If Mr. Butler is not acting in behalf of the Sheriff when he transports patients to the hospital, but is acting in some other capacity, the Act is without application to him, and in that case his compensation should be determined without reference to the

recent Act and as provided by Code 1940, Title 45, § 211.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 29, 1943.

Hon. T. C. Garner,

Treasurer, Jefferson County,

Birmingham, Alabama.

Jefferson County—Bailiffs—Bailiff-secretary—Civil Service Law—Code 1940, Tit. 12, §§ 133-159, as amended—Act No. 528, H. 832, approved July 10, 1943—Act No. 169, H. 337, approved June 17, 1943.

Bailiffs in Jefferson County, required to do secretarial, stenographic and clerical work in addition to performance of their duties as bailiffs prescribed by law, as authorized by Act No. 169, H. 337, approved June 17, 1943, may be placed in a separate class or grade from other bailiffs and a salary schedule for them may be fixed by order or resolution of the county commission, subject to disapproval within thirty days by the county Personnel Board, as provided by Code 1940, Tit. 12, § 144, as amended by Act No. 528, H. 832, approved July 10, 1943.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

On August 20, 1943, you requested my official opinion, among other things, as follows:

"1st—Can the Jefferson County Commission legally create a position of bailiff-secretary or bailiff-stenographer, for the Circuit Judges of the 10th Judicial Circuit, with increased pay over other bailiffs under House Bill 337 enacted in 1943?

"2nd—If this position can be created by the commission what effect will house bill No. 838 have on this position, which reads in part, that it authorizes a secretary to all elected officials of Jefferson County except Judges?"

In Jefferson County (Tenth Judicial Circuit) under Code 1940, Tit. 62, §§ 229, 230, circuit judges may "under the provisions of the civil service law" appoint bailiffs, "whose employment and compensation shall be governed by

any applicable civil service law."

Under Act No. 169, H. 337, approved June 17, 1943, such bailiffs may be required by such circuit judges so appointing them "to perform clerical, stenographic or secretarial work in addition to other work." The act is silent as to their compensation; silent, likewise, as to the occasion or purpose for the performance of such additional work.

The result of the two statutes, construed in pari materia as they must be, is potentially at least to create two classes of bailiffs in Jefferson County; (a) plain bailiffs, with duties such as are performed in other counties of the state; and (b) clerical-secretarial bailiffs, with undefined duties, but whose qualifications for employment necessarily differ from the qualifications necessary for plain bailiffs.

Naturally according to current economic theory the two classes of bailiffs thus created may expect to be compensated for their respective services at different rates of pay, because of difference in education, training and experience.

By the express terms of Code 1940, Tit. 62, §§ 229, 230, Jefferson County bailiffs are in the classified service under its civil service law, (Code 1940, Tit. 12, Ch. 12, §§ 133-159, as amended by Act No. 528, H. 832, approved July 10, 1943); and necessarily upon division of the class of bailiffs into two different classes, requiring different qualifications, as above indicated, by reason of Act No. 169, supra, both classes will logically fall within the classified service aforementioned.

There being no question as to the status of bailiffs in general as members of the classified service, the county director of personnel, with approval of the personnel board, is expressly authorized to "grade and classify" such "positions *** with respect to salary to the end that each employee shall receive the same compensation as all other employees of the said county *** receive for the same grade and class of service." Code 1940, Tit. 12, § 144, as amended, supra.

As already indicated the effect of Act No. 169, H. 337, approved June 17, 1943, is, upon exercise of the authority thereby vested in circuit judges to require bailiffs to do additional work calling for secretarial, clerical or stenographic ability, to create two classes or grades of service, because it is unreasonable to think that a bailiff will be "required" to do such additional work if he is incompetent or not qualified therefor. The director of personnel may very properly therefore sub-divide, class or grade bailiffs: (a) as plain bailiffs, and (b) as secretarial-clerical bailiffs. He may assume that a bailiff who is required by the circuit judge, pursuant to the statute, to do additional work of a clerical-secretarial-stenographic nature, is or should be qualified by training, education and experience therefor, and is therefore entitled to be graded and classed in a separate, distinct class from the ordinary bailiff who is not required to do such work.

I find nothing in Act No. 528, H. 832, approved July 10, 1943, in conflict with these conclusions. That act amends Code 1940, Tit. 12, § 134 by including in the unclassified service "one private secretary of a member of the gov-

erning body **and of each officer except judges elected by the vote of the people.**" The underscored words have been inserted in said section by way of amendment, but there is nothing therein conflicting with the effect of the Act of June 17, 1943, supra, authorizing circuit judges to require secretarial work by bailiffs whom they appoint,—assuming such appointees to be qualified for such work. The act does not purport to create a private secretary for the appointing judge, and such appointee cannot therefore be fairly excluded from the classified service, on the theory that he belongs to the unclassified service. The fair inference from the above underscored language is that if there is a private secretary appointed for a circuit judge he belongs to the classified service, because the private secretaries of all officers "except judges elected by vote of the people" (including circuit judges of course, who are so elected) are expressly assigned by the amendment to the unclassified service.

I find nothing in the amendatory act (No. 528, H. 832, supra) authorizing the Jefferson County Commission legally to "create a position of bailiff-secretary or bailiff-stenographer" (to quote the language of your 1st inquiry). The position is "created" upon appointment by a circuit judge of a bailiff who is required to do stenographic secretarial, or clerical work, in addition to his work as bailiff in the ordinary meaning of that word.

The effect of the act, so far as the County Commission is involved, is that the Commission may by order or resolution make "changes in the salary schedule of one class or a number of classes less than all," by filing a certified copy of such order or resolution with the personnel board, which order or resolution, if not within thirty days disapproved by the Board, "shall be valid and operative according to its terms." Act No. 528, supra, Section II amending Code 1940, Tit. 12, § 144.

The opinion of this office heretofore rendered at your request under date of September 1, 1943, so far as it conflicts with the foregoing is modified and withdrawn.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 30, 1943.

Mrs. C. F. Hart,

Tax Assessor,

Covington County,

Andalusia, Alabama.

Exemptions—Allowed by Title 51, Section 2 (j) run to property and not to status of person to whom assessed.

Opinion by Assistant Attorney General Sykes.

Dear Madam:

Your request for an official opinion bearing date of August 12, 1943, is as follows:

"Please refer to Title 51, Section 2, Subsection J, Code of 1940, and advise as follows:

"Should all or any part of these exemptions be given,

"(a) A married woman who lives with her husband, the property being assessed in her name.

"(b) A single man.

"(c) A married man and his wife to whom the assessments are jointly made.

"(d) To an executor or administrator of an estate.

"(e) To the heirs of an estate and to whom the property is assessable.

"Please advise which exemptions, if any, of said Sub-section J, supra, should be allowed such persons, a to e, inclusive, supra. If you have an opinion on the subject, please give me the citation on the holding thereof."

Title 51, Section 2, Code of Alabama 1940 provides in part:

"The following property and persons shall be exempt from ad valorem taxation and none other: ***

(j) 1. Provisions and supplies on hand for the current year for the use of the family and the making of the crops;

2. All wearing apparel;

3. Farming tools to the value of one hundred dollars;

4. Tools and implements of mechanics to the value of one hundred dollars;

5. And the following property to be selected by the head of each family; namely, two mules or two horses, two cows, two calves, ten hogs, twenty sheep, twenty goats, household and kitchen furniture not to exceed in the aggregate two hundred and fifty dollars and one sewing machine."

(Arabic numbers inserted for reference)

You ask which exemptions should be allowed to the persons enumerated in a to e.

It is obvious that the exemptions listed in subsection (j), supra, are an enumeration of **personal property** that is exempt and not of **persons** who are exempt. It is equally apparent that some of the property listed must be held for certain uses while other property listed must be selected by certain persons before the property is exempt.

The exemptions from taxation are to be strictly construed. **Brown v. Protective Life Insurance Co.,** 188 Ala. 166, 66 So. 47. And the person claiming the exemption has the burden of showing same.

After considering each type of personal property (j 1, 2, 3, 4 and 5) in connection with the persons listed it is my opinion that it makes no difference to whom the property is assessed—whether it be assessed by any of the persons listed from a to e inclusive, the exemption runs to the **property** and not to the status of the person making the assessment.

You are, therefore, advised to allow exemptions to all persons enumerated when the property fits the description and uses shown by Title 51, Section **2** (j), Code of Alabama 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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